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IN THE

Supreme Court of the United States

October Term, 1956

No. 829

NORTH AMERICAN AIRLINES, INC., et al.,
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

TELFORD TAYLOR and
GEORGE J. SOLOMON
400 Madison Avenue
New York 17, N. Y.

HARDY K. MACLAY and
WALTER D. HANSEN
1317 F Street, N.W.
Washington 4, D. C.
Attorneys for Petitioners.

Of Counsel:
LANDIS, TAYLOR & SCOLL
400 Madison Avenue
New York 17, N. Y.

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Civil Aeronautics Board,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioners, North American Airlines, Trans National Airlines, Trans American Airways, Hemisphere Air Transport, North American Air Coach System, and Stanley D. Weiss, James Fischgrund, Jack B. Lewin and R. R. Hart, individually and as partners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on December 20, 1956.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. 1A-14A) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1956, and a petition for rehearing was denied January 18, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals for the District of Columbia affirmed that part of an order of the Civil Aeronautics Board which revoked Letters of Registration as "irregular air carriers" previously issued by the Board to the petitioner carriers, and directed the individual petitioners to cease and desist from engaging in air transportation otherwise than in accordance with Section 401(a), and from violating Section 408 of the Civil Aeronautics Act. The Board's entire order was based on alleged violations by petitioners of certain provisions of the Civil Aeronautics Act, 49 U.S.C. § 401 *et seq.*, and the Board's "Economic Regulations". The questions are:

1. Whether the Board is authorized to revoke Letters of Registration, without weighing all factors relevant to the statutory standard of "public interest" and the declared policy of the Act, and on the sole ground of violation of the Act and the Board's regulations.

2. Whether the court below erred in affirming the Board's order revoking petitioner carriers' Letters of Registration, since the court affirmed only certain of the Board's findings against petitioners, while the Board's decision to revoke was based on all such adverse findings.

3. Whether the facts found by the Board establish a violation of Section 408 of the Act, 49 U.S.C. § 488, relating to consolidations, mergers, and acquisition of control of air carriers.

4. Whether an irregular air carrier's violation of Section 408 of the Act is *ipso facto* a violation of Section 401 of the Act, 49 U.S.C. § 481, prohibiting air carriers from engaging in air transportation without a certificate of public convenience and necessity, and constitutes *per se* a sufficient basis for revocation of Letters of Registration.

5. Whether the decision of the court below has resulted in enforcing the 1949 regulations, the validity of which has been challenged by petitioners, while at the same time denying petitioners judicial review of their validity.

6. Whether the Board denied petitioners a fair hearing by reason of the Board's refusal to (a) disqualify one of its members on grounds of bias and prejudice, and (b) produce or consider relevant evidence from its own files.

STATUTES INVOLVED

The relevant provisions of the Civil Aeronautics Act of 1938, 52 Stat. 977, as amended, 49 U.S.C. § 401 *et seq.*, and the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. § 1001 *et seq.*, are set forth in Appendix B, *infra*, pp. 15A-21A.

STATEMENT

Four of the petitioners are air carriers [1] conducting non-certificated passenger operations under Letters of Registration as "irregular carriers" issued to them by the respondent (hereinafter referred to as the "Board") pursuant to the Civil Aeronautics Act and the Board's "Economic Regulations" adopted thereunder. Petitioner North American Air Coach System, Inc., is a general agent for the sale of the carriers' services, through ticket

[1] These are corporate petitioners North American Airlines, Trans National Airlines, and Trans American Airways, and the individual proprietor Jacob Freed Adelman, d.b.a. Hemisphere Air Transport.

sales, advertising, and other activities. All its stock is owned by the four individual petitioners, Stanley D. Weiss, James Fischgrund, Jack B. Lewin, and R. R. Hart, who also are partners in enterprises which perform accounting and fiscal services for the carriers, and lease aircraft to them.[2]

In the spring of 1946, individual petitioners Weiss and Fischgrund established a non-scheduled airline known as "Standard" and petitioners Lewin and Hart established another known as "Viking". In the operation of these carriers, petitioners originated and developed the low-fare, non-luxury air transportation which has become known as "aircoach".[3] Like all other non-scheduled carriers using large aircraft for passenger operations between major traffic centers, Standard and Viking "dovetailed" their flights with those of other non-scheduled lines so that their collective operations provided a more regular service than that of any single line. As part of this arrangement, their ticket agents commonly sold "exchange orders" which were accepted by all participating carriers, rather than tickets good only on the issuing carrier.[4]

Until 1947, non-scheduled air carriers were exempted by the Board's Regulations[5] from all the requirements of

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[2] All four individuals are equal partners in Republic Air Coach System (accounting and fiscal), and Twentieth Century and California Aircraft Companies (ownership and leasing of aircraft). Petitioners Weiss and Fischgrund are equal partners in Standard Airmotive Company, which also owns aircraft leased to the carriers.

[3] R. 510-13 and 599. Petitioners Weiss and Fischgrund owned Standard Airlines, and petitioners Lewin and Hart were officers and part owners of Viking Airlines.

[4] R. 523-31, 547-55, 577, 599-608, 622, 645, and 701-09.

[5] Regulation 400-1, adopted December 7, 1938, 3 F.R. 239. Non-scheduled carriers remained subject to the labor provisions of Section 401 (1) and the reporting requirements of Section 407.

the Civil Aeronautics Act that are pertinent to this case, including the certification and consolidation-merger-control provisions.[6] In the spring of 1947, the Board adopted amended regulations (Section 292.1 of the Economic Regulations, referred to hereinafter as the "1947 regulations")[7] ending the non-scheduled carriers' blanket exemption from certain provisions of the Act and requiring them to apply to the Board for individual operating authority in the form of Letters of Registration as "Irregular" air carriers. Such Letters were duly issued to each of the petitioner carriers at various dates from May, 1947 to April, 1948 (R. 45), and are still in effect pending the outcome of this proceeding.

In 1948, the individual petitioners determined to seek Board approval for scheduled operations by Standard and Viking. To this end, on July 28 and 29, 1948 both carriers filed applications under Section 401 of the Act for certificates of public convenience and necessity to engage in scheduled aircoach passenger transportation. Simultaneously, the carriers filed requests that the scope of their Letters be expanded temporarily to cover scheduled aircoach operations, pending action on the applications for certificates.

The Board denied the requests for temporary expansion of the exemptions.[8] It also commenced separate proceedings against Standard and Viking to revoke their Letters of Registration on the ground that each had flown too frequently and regularly, had thus exceeded the scope of the exemption in their Letters of Registration, and had therefore violated Section 401 of the Act by

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[6] Sections 401 (a) and 408, 49 U.S.C. § 481(a) and § 488, Appendix B *infra*, pp. 15A-17A. These are the sections which the Board has found that the petitioners violated.

[7] 12 F.R. 3076, adopted May 5, effective June 10, 1947.

[8] *Standard Airlines, Inc.*, 9 C.A.B. 583 (1948).

conducting scheduled operations without a certificate. After hearing,[9] Standard's Letters were revoked in June, 1949, and Viking's a year later.[10]

Meanwhile, in May, 1949 the Board again changed the Economic Regulations[11] by terminating the exemption of "Large Irregular Carriers"[12] from all provisions of the Act except the certification and related sections.[13] The amendments also terminated *in futuro* the exemption by letters issued to registrants under the 1947 regulations, and required each large irregular carrier to submit an application for exemption under the regulations as amended; however, Letters of Registration then outstanding were to remain effective until action on the exemption applications. The four petitioner carriers all filed exemption applications and these, like those of all other such applicants, are still pending before and undisposed of by the Board.[14]

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[9] The Board attempted to suspend Standard's Letters without a hearing, but this action was reversed by the Court of Appeals for the District of Columbia. *Standard Airlines* v. *Civil Aeronautics Board*, 177 F. 2d 18 (1949).

[10] *Standard Airlines, Inc.*, 10 C.A.B. 486 (1949); *Viking Airlines, Inc.*, 11 C.A.B. 401 (1950).

[11] On December 10, 1948, the Board had promulgated an "interpretation" of the 1947 regulations specifying drastic restrictions on the permissible pattern and frequency per month of irregular carrier flights.

[12] A "large" irregular carrier was defined as one which utilizes aircraft with a gross take-off weight in excess of 10,000 pounds for any one unit or of 25,000 pounds for all units. The petitioner carriers are and have been large irregular carriers as so defined.

[13] 14 F.R. 1879 adopted April 13 effective May 20, 1949. The exemption was continued for Sections 401(a) (certification), 404(a) (duty to furnish transportation on reasonable request) and 405 (e) (reporting schedule of routes available for mail carriage).

[14] In 1951 the exemption applications were consolidated for hearing in Docket 5132, *Large Irregular Air Carrier Investigation*. The Examiner's Initial Decision was issued January 10, 1957.

In order to develop their existing service and demonstrate its economic feasibility and public interest values, during the winter of 1949-50 the four individual petitioners joined in establishing the sales, fiscal, and aircraft-leasing enterprises already mentioned (North American Air Coach, Republic Air Coach, etc.) as service organizations for non-scheduled passenger air carriers. During 1950 and 1951 these enterprises entered into the arrangements with the four petitioner carriers [15] for sales, advertising, fiscal services, and aircraft leasing and maintenance that comprise "North American Airlines" (R. 37). In the belief that the several petitioner entities would be better able to perform satisfactory air transportation if they were merged into a single organization, petitioners filed their application for approval of the merger agreement on August 5, 1952. This agreement disclosed to the Board the functions performed by each of the petitioners in furnishing aircoach transportation.

While these enterprises were being developed, the Board on December 10, 1949 promulgated additional amendments [16] to the Economic Regulations. This time the large irregular carriers were prohibited from entering into arrangements, among themselves or with ticket agents, for interchange of passengers and rotation of flights in such a manner that "the collective air transportation service so . . . arranged would, if conducted by a single carrier, take it out of the classification of an irregular carrier . . .". Agreements between large irregular carriers and ticket agents were required to be written and filed with the Board, together with copies of all publicity material

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[15] Prior to this time there had been no operating or financial connections between the four petitioner carriers and the four individual petitioners.

[16] 14 F.R. 6807, adopted November 4 effective December 10, 1949. Previously, the regulations had been redesignated as "Part 291." 14 F.R. 3546.

pertaining to their passenger operations.[17] The Economic Regulations as amended in May and December 1949 are referred to herein as the "1949 regulations."

Petitioner carrier Trans American Airways, prior to its association with the individual petitioners, had applied for a certificate for scheduled aircoach operations. This and other like applications from non-scheduled carriers were denied by the Board in November, 1951[18] on the ground that the carriers already certificated under the "grandfather clause"[19] could expand their operations to take care of any demand for service. The petitioners continued their operations, and petitioner carriers' applications under the 1949 regulations for individual exemptions remained pending before the Board as they still do.[20] On March 12, 1953 the present proceeding (Docket No. 6000[21]) to revoke petitioner carriers' Letters of Registration was instituted (R. 2-29), and shortly thereafter petitioners again applied for certificates for aircoach service between some 21 major cities.[22]

Before the Board, petitioners were charged with violations of Section 408 of the Act and with holding out

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[17] The filing requirements were contained in amendments (simultaneously promulgated) to Part 242 of the Economic Regulations, embodying various reporting requirements. 14 F.R. 6806.

[18] *Transcontinental Coach-Type Service Case*, 14 C.A.B. 720 (1951).

[19] Section 401(e), 49 U.S.C. § 481(e).

[20] *Supra*, p. 6, and note 14.

[21] Entitled *Twentieth Century Air Lines, Inc.*, the predecessor name of petitioner North American Airlines, Inc.

[22] Thereafter, various portions of petitioners' applications were consolidated on a geographical basis with other applications, in several proceedings, entitled *New York-Chicago Service Case, Denver Service Case, Additional Southwest-Northeast Service Case, New York-Florida Proceeding*, etc. These are currently in various stages of disposition by the Board and the courts.

and conducting a scheduled passenger carrier service without a certificate of public convenience and necessity in violation of Part 291 of the Economic Regulations (of 1949) and Section 401(a) of the Act. By reason of these alleged violations, it was proposed that petitioner carriers' Letters of Registration be revoked, and all petitioners be ordered to cease and desist from engaging in air transportation (R. 17). In their answers (R. 30-44), petitioners admitted the factual allegations in part; challenged the validity of 1949 regulations as arbitrary, capricious, and invalid as applied to petitioners, on the ground that they constituted modifications of petitioners' operating licenses (Letters) adopted without adjudicatory hearing;[23] challenged the validity of the proceeding on the ground that the question of public interest had been excluded from the issues; stated that petitioners had "complied with all properly applicable statutes, rules and regulations, and orders"; and moved to dismiss the complaint.

The Board took no action on the motion to dismiss the complaint, and scheduled hearings to be held in Los Angeles beginning June 23, 1953. Petitioners, urging the invalidity of the 1949 regulations, applied to the District Court for the Southern District of California for an order restraining the Board from proceeding with the hearing. That court was of the view that venue was improperly laid, but was prepared to grant a ten-day restraining order so that action could be brought in the proper court. Thereupon, the Board postponed the hearing to July 6, 1953.

On June 30th, seeking to avoid further litigation, petitioners filed with the Board a "Petition for Expeditious Action" (R. 58-70) on their motion to dismiss; therein the legal basis of the challenge to the 1949 regulations was

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[23] In their amended answers (R. 49-58) filed in March, 1954, petitioners requested a hearing on the validity of the 1949 regulations (R. 51).

spelled out, and it was pointed out that a recent decision of the Court of Appeals for the District of Columbia had cast grave doubt on their validity. *Civil Aeronautics Board* v. *American Air Transport,* 201 F. 2d 189 (C.A. D.C. 1952).[24] On July 1st the Board in substance denied the petition by deferring its disposition until the conclusion of the hearings, primarily on the ground that the petitioners were charged with violations of Sections 401 and 408 of the Act, and therefore the proceeding might be disposed of without reference to the 1949 regulations (R. 70-72). Petitioners thereupon sought an injunction from the District Court for the District of Columbia, but this suit ultimately failed for lack of showing of irreparable injury (R. 143). *Twentieth Century Airlines* v. *Ryan,* 74 S. Ct. 8 (1953); *cf. Arrow Airways* v. *Civil Aeronautics Board,* 182 F. 2d 705 (C.A. D.C. 1950).

In the course of the hearings which then ensued, petitioners submitted a proposal (R. 94-118) to suspend the proceeding on the understanding that their Letters of Registration would be surrendered for cancellation upon the disposition, favorable or unfavorable, of their pending applications for certification. In support of this proposal, petitioners urged that in certification proceedings

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[24] In that case, two large irregular carriers sued to enjoin enforcement of newly applicable economic regulations on the ground that they constituted amendments, without adjudicatory hearing, of the carriers' Letters of Registration. The district court granted the injunction. *American Air Transport* v. *Civil Aeronautics Board,* 98 F. Supp. 660 (D.D.C. 1951). On appeal there was no majority in the Court of Appeals; questions were certified to this Court, but the certificate was dismissed on the ground of generality. *Civil Aeronautics Board* v. *American Air Transport,* 344 U.S. 4 (1952). The Court of Appeals then remanded the case to the district court to determine whether the new regulations constituted an amendment of the Letters or merely a definition of their terms. Thereafter the proceeding lapsed, and the Letters of one of the carriers were subsequently revoked for violation of the 1947 regulations under which the Letters were originally issued. *American Air Transport* v. *Civil Aeronautics Board,* 206 F. 2d 423 (C.A. D.C. 1953).

the Board could better weigh all the relevant public interest factors, including the alleged economic violations, the past and anticipated public benefits of petitioners' aircoach service and special safety practices, and the execution of the declared policy of the Act (Section 2, 49 U.S.C. § 402) in terms of competition and the entry of new carriers into regular air transportation. With two members dissenting the Board rejected this proposal, and likewise rejected petitioners' subsequent requests that the Board reconsider the proposal (R. 139-64).

At the conclusion of the hearings, the Examiner found [25] the 1949 regulations valid, found that the individual petitioners had acquired control of the carrier petitioners in violation of Section 408 of the Act and that the carrier petitioners collectively and individually held out and operated a regular service in violation of Section 401 and the 1949 regulations, and recommended that the Letters of Registration be revoked (R. 1367-71). Petitioners then renewed their proposals for settlement of the controversy *via* the pending certification proceedings, and requested opportunity for conference with the Board. These proposals and requests were all denied (R. 1400-34, 1483-99, 1506-07).

On July 1, 1955 petitioners moved to disqualify a member of the Board for bias and prejudice, supporting the motion with an affidavit charging, *inter alia*, that the member had repeatedly impugned North American's safety record, with full knowledge that the constituent carriers' safety records and practices were in fact excellent (R. 1435-44). The Board denied the motion the same day (R. 1504-05), and simultaneously issued its opinion and order in the proceeding [26] overruling petitioners' excep-

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[25] The Examiner's Report is set forth in the record at pp. 1256-1399.

[26] Docket No. 6000 Compliance Proceeding, *Twentieth Century Airlines, Inc., et al.* (R. 1445-1503).

tions to the Examiner's report, finding that all petitioners had violated sections 401(a) and 408 of the Act and the 1949 regulations, and ordering that petitioner carriers' Letters of Registration be revoked, and that all petitioners be ordered to cease and desist from engaging in air transportation otherwise than in conformity with the 1949 regulations.[27] Vice Chairman Adams concurred in the finding that the petitioners had violated the 1949 regulations, but dissented from the order revoking the Letters of Registration (R. 1473-82).

The Court of Appeals affirmed the Board's order insofar as it (a) revoked petitioner carriers' Letters of Registration, (b) ordered "the partnership or joint venture known . . . as . . . North American Airlines" and the petitioner carriers to cease and desist from engaging in air transportation, and (c) ordered the individual petitioners and their service enterprises to cease and desist from violating Sections 401(a) and 408 of the Act.[28] On the ground that this disposition of the case "makes it unnecessary", the court did not pass on the Board's order insofar as it ordered petitioners to cease and desist from violations of the 1949 regulations.

In its opinion, the Court of Appeals based its decision upon the narrow ground that all petitioners formed a "single integrated carrier" in violation of Section 408(a)(1) and (5) of the Act, the operations of which without

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[27] The cease and desist order was to be effective immediately, and the revocation order as of September 1, 1955. On July 29, 1955 the Board extended the effective date of the cease and desist order to August 30, 1955, and of the revocation order "until 30 days after the entry by a Court of Appeals of any decision affirming said order" (R. 1508-12). Thereafter the Court of Appeals for the District of Columbia stayed the cease and desist order pending its own review of the Board's action. The entire order is presently stayed by stipulation of the parties pending the outcome of the proceeding in this Court, provided the petition for certiorari be filed by March 11, 1957.

[28] See the court's opinion, Appendix A, *infra* p. 12A-14A.

a certificate were in violation of Section 401(a) of the Act, and that Letters of Registration issued pursuant to the 1947 regulations could lawfully be revoked by the Board on the basis of such violations of the Act.[29] The court did not consider the application or pass on the validity of the 1949 regulations, on which the original complaint before the Board was so largely based[30] and the validity of which petitioner had repeatedly and vainly sought to test. The Board had declined to weigh the public interest values of petitioners' continued operation against the enforcement factor; the court was equally oblivious to the statutory standard and its application to the Board's action.[31] The Board determined to revoke the Letters of Registration on the basis of all its findings adverse to the petitioners (R. 1466); the court affirmed that determination without passing on the validity of some of the adverse findings on which it was based.

The court also denied petitioners' claim of error in the Board's failure to disqualify one of its members, on the ground that he had been challenged too late, and rejected petitioners' other contentions. A petition for rehearing was denied without further opinion on January 18, 1957.

REASONS FOR GRANTING THE WRIT

The upshot of these proceedings has been that:

(a) Petitioner carriers' Letters of Registration have been revoked without reference to the statutory standard of public interest by which the Board's exercise of administrative discretion is governed, and on the sole basis of its findings that petitioners have violated certain provisions of the Act and of the 1949 regulations;

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[29] *Id., infra* pp. 9A-12A.

[30] See paragraphs 27-38 of the complaint (R. 12-14).

[31] *Infra*, pp. 14-20.

(b) The court below has affirmed the Board's revocation action as an exercise of administrative discretion, likewise without reference to the statutory standards, and also without passing on the validity of several of the findings on the basis of which the Board's discretion was exercised; and

(c) Petitioners have been denied judicial review of the 1949 regulations, whether in injunction proceedings or on direct review of the Board's revocation and cease-and-desist order, although that order is based in substantial part upon those regulations.

In all these respects, the judgment below is in conflict with the applicable decisions of this Court and other Federal courts of appeal. The judgment below also rests on misinterpretations and misapplications of Section 408 of the Act, which are likewise in conflict with the decisions of this court and other Federal courts of appeal. Apart from the individual errors of law which have been committed at various stages, the entire course of these proceedings presents serious issues of administrative practice and important questions of statutory policy which abundantly warrant and urgently require review by this court.

1. *Disregard of Statutory "Public Interest" Standard.* Section 2 of the Civil Aeronautics Act, 49 U.S.C. § 402, provides that, in the exercise of all its powers under the Act, the Board is governed by the general standard of "public interest" and "public convenience and necessity." Some of the specific ingredients of the standard are described in the ensuing "declaration of policy." They include promotional and developmental policies in furtherance of a safe, economical and financially stable air transportation system of sufficient size and scope to meet the nation's present and future needs. "Competition" is expressly declared to be in the public interest "to the extent necessary to assure" the success of these policies.

The application of this standard in the present proceeding raised important issues of statutory policy. It presented, for example, the entire question of the entry of new carriers into transcontinental and other major route operations.[32] For while the theory of the Act is one of controlled and regulated rather than unlimited competition, Congress certainly intended that there should be new carriers as well as those protected by the "grandfather" clause. This is plain from the very structure of the Act, based as it is on the certification procedure of Section 401, 49 U.S.C. § 481, which would be meaningless if not intended to be used, and is abundantly supported by the Act's legislative history.[33]

Nevertheless, throughout the entire period of its existence the Board has never issued a certificate for major passenger operations other than to a "grandfather" carrier. There are, accordingly, no new certificated passenger carriers, and all trunkline service is provided by the remaining 12 of the original 18 "grandfather" carriers.

Furthermore, it is and has been clear that if there are ever to be any additional certificated carriers, they must come from among the irregular carriers with actual experience in route operations, for the Board has stated and

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[32] *I.e.*, trunkline operations between major traffic centers as distinguished from "feeder" operations between the trunk routes and minor traffic centers.

[33] During the course of the hearings preceding enactment of the Civil Aeronautics Act, opposition developed to the proposed certification procedure. (See *e.g.*, Report of Federal Aviation Commission, 74th Cong. 1st Session, Senate Document 15 (1935). The proponents of the bill met this opposition by stating that new carriers would have every opportunity to get into the business. See *e.g.*, *Hearings on H.R. 5234 and H.R. 4652*, pp. 75, 112, 113 and 344; *Hearings on S. 2 and S. 1760*, pp. 305-08 and 503. During the debate in the Senate, Senators Truman and Copeland stressed the numerous provisions in the Act which evidenced a policy in favor of competition, and Senator Truman assured Senator King that there would be opportunity for new certificated carriers. See,*e.g.*, 83 Cong. Rec. pp. 6726, and 6851-52.

decided that it will deny applications for certificates for enterprises without operating experience,[34] and the only way that such experience can be obtained prior to certification is by the conduct of operations as an "irregular" carrier under exemption (Section 416, 49 U.S.C. § 496) from the certification requirements.

Petitioner carriers are the last surviving of a very small group of irregular carriers with experience in transcontinental and other air coach operations with large aircraft.[35] If their Letters are to be revoked, there will remain no practical possibility that there ever will be additional certificated carriers. Furthermore, petitioners' operations have been highly successful, in terms of safety, service, and financial stability, and the competition they have offered to the certificated carriers has been of enormous benefit to the traveling public, as reflected in the greatly reduced fares for air coach service, making air travel available to individuals of modest financial means. All this has been recognized by the Board and is not disputed.[36]

Once the Board had found that the petitioners had violated the consolidation-merger-control provisions of the

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[34] *Additional Service to Atlanta and Birmingham*, 2 C.A.B. 447 (1941).

[35] This group arose immediately after World War II, when large military air transports became available for purchase for civilian use and numerous experienced pilots left the service and entered civilian life. *Investigation of Nonscheduled Airlines*, 6 C.A.B. 1049, 1053 (1946). Petitioners' first aircraft were purchased from war surplus, and petitioner Weiss is a former Army pilot. At the present time, there are no irregular carriers other than the petitioners conducting route operations with large aircraft.

[36] Report of the Civil Aeronautics Board submitted to the Subcommittee on Monopoly of the Select Committee on Small Business, U.S. Senate, 82d Congress, 2d Session, November 24, 1952 at page 30. Opinon of the Board in the *Large Irregular Air Carrier Investigation*, Docket No. 5132, Order No. E-9744, dated November 15, 1955, Mimeo Opinion pp. 19-22.

Act (Section 408) and the 1949 regulations,[37] its task was to weigh the public interest values of petitioners' operations against the compliance factors stemming from the violations, and determine what action would best serve the public interest. Conceivably, the Board might find that the compliance factors outweighed the operational benefits, and that enforcement policy required revocation of petitioners' Letters. In that event, the role of the courts would be simply to determine whether or not the Board's action was based on evidence and embodied a reasonable exercise of judgment, or whether it was arbitrary and capricious. But in this case that question is not presented, for the Board declined to weigh the public interest values, and has not exercised its administrative discretion as required by the statutory standard.

Petitioners repeatedly urged the Board to weigh all the relevant public interest factors before determining what, if any, sanctions should be imposed on them for their alleged violations. The statutory necessity for a decision governed by the public interest standard was specifically urged in petitioners' original answer (R. 42), and was repeated in the several petitions and settlement proposals submitted by the petitioners to the Board (R. 95, 108-110, 149-54, 158-63, 1411-19, and 1434).

The Examiner, however, declined even to consider the issue. He stated that the question of beneficial or harmful effect of petitioners' operations "is not an issue under the allegations alleged in the complaint," and concluded that consequently, "no determination can be made with respect to whether respondents' [petitioners] operations . . . have or have not harmed . . . any member of the public" (R. 1368). Subsequently he observed that: " . . . it cannot be found that respondents were particularly concerned with the public interest but, on the contrary, were

[37] The invalidity of these findings is discussed *infra*, pp. 22-25 and 29-33.

more interested in private gain" (R. 1369). The question of petitioners' motives was, of course, irrelevant. The issue was not whether petitioners were "concerned" with the public interest, but whether it was in the public interest to revoke petitioners' Letters of Registration and thus terminate their operations.

The Board was similarly unwilling to consider the public interest factors necessarily involved in the proceeding, and stated (R. 1467):

> " . . . we see no substance to respondents' [petitioners'] attempt to try in this proceeding the so-called public interest aspects of their air transportation service."

In thus disregarding the statutory standard by which the Board's actions must be governed, it is clear that the Board committed a fundamental error, fatal to the validity of its decision. For it is well established that the Board's actions in connection with the issuance and revocation of Letters of Registration, like every other determination, must be governed by the public interest standard, and that the Board must take into account all the various elements and factors relevant to a decision, guided by that standard. *Civil Aeronautics Board* v. *State Airlines,* 338 U.S. 572, 580 (1950); *American Airlines* v. *North American Airlines,* 351 U.S. 79, 85 (1956). Here, as in *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608 (1946), the administrative body failed to consider any accommodation between its enforcement policy and the requirements of other elements relating to the public interest.[38]

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[38] *Federal Communications Commission* v. *WOKO,* 329 U.S. 223 (1946) is not to the contrary. There the Commission was concerned with deceptions and misrepresentations on the part of the licensee which were flagrant and continuous; here there is no charge of misrepresentation whatsoever. Furthermore, this Court's opinion made it clear that even in such circumstances the administrative action must be governed by the statutory standard. See 329 U.S. at 229. This is in accordance with the Commission's own practice, which has been to renew licenses even in the face of flagrant violation where the public is dependent on continued serv-

Indeed, unless the Board weighs all of the criteria, it is left without a standard to govern its choice of sanctions in case violations are proved. *Cf. Continental Southern Lines* v. *Civil Aeronautics Board,* 197 F. 2d 397, 402 (C.A.D.C. 1952); *National Air Freight Forwarding Corporation* v. *Civil Aeronautics Board,* 197 F. 2d 384, 386-387 (C.A.D.C. 1952). Petitioners do not, of course, contend that it would be in the public interest to tolerate continuing conditions of violation of the Act and the Board's valid regulations, but there are many ways other than revocation to bring about a state of compliance—cease-and-desist orders, temporary exemptions, divestment orders, and others. In the present case, however, the Board determined to revoke the Letters of Registration without weighing the consequences or considering alternative courses of action, in clear violation of the Act and the standards which govern Board action.

The decision below affirming the Board's order is based on the same error, and is in conflict with a decision of the Court of Appeals for the Second Circuit, as well as with its own prior decisions. *North American Airlines* v. *Civil Aeronautics Board,* 228 F. 2d 432, 438 (C.A.D.C. 1955); *New England Air Express* v. *Civil Aeronautics Board,* 194 F. 2d 894 (C.A.D.C. 1952); *W. R. Grace & Co.* v. *Civil Aeronautics Board,* 154 F. 2d 271, 286 (C.A. 2d 1946); *American Airlines* v. *Standard Air Lines,* 80 F. Supp. 135, 139-40 (S.D. N.Y. 1948). For in the court's opinion, it is categorically stated that if the petitioners "were properly found in violation of Section 401(a) of the Act," then "quite apart from other grounds, the Board's order of revocation of the carriers' Letters of Registration and its 'cease-and-desist' orders against all petitioners on

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ice from the licensee. See, *e.g., Panama City Broadcasting Co.* 9 F.C.C. 208 (1942), *Navarro Broadcasting Associates,* 8 F.C.C. 198 (1940); *cf. Churchill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d 244 (C.A.D.C. 1947).

that ground must be sustained" (Appendix A *infra*, p. 8A). True it is that the Board has authority to revoke Letters of Registration for violations of their terms, but only if, in the light of all relevant factors, such a decision is warranted under the public interest standard.

Accordingly, the judgment below should be reversed and the proceeding should be remanded to the Board with instructions to weigh all factors arising from the continuance or discontinuance of petitioner's operations, insofar as they relate to the public convenience and necessity, and give due weight to such factors in determining whether or not petitioners' letters of registration should be revoked or other action be taken.

2. *Failure to Review the Findings on Which the Board's Order is Based.* "We . . . hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." See *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 85 (1943). But in the present case the court below did not review all of "the grounds upon which the agency acted in exercising its powers," and it cannot be assumed that the Board would have come to the same decision and revoked petitioners' Letters on the basis of only those findings which were affirmed below.

The Board's decision leaves no room for doubt that it determined to revoke petitioners' Letters of Registration on the basis of *all* the violations of the Act and the regulations which it found petitioners had committed (R. 1465-66). To be sure, the Board referred to each of four types of violation as an "independent" basis which would "justify the sanction of revocation". But this means only that each type could be relied on by the Board as a sufficient legal ground for exercising its discretion to revoke. However, the Board's decision to exercise its discretion by revocation and not in some other way was explicitly taken

on the basis of all four types of violation, which "taken together . . . make revocation inevitable" (R. 1466).

Of the four types of violations summarized in the Board's decision (R. 1465), one is exclusively and two are in part violations of the 1949 regulations. The court below, however, did not pass on the validity of those regulations and expressly stated that its decision affirming the Board's order does not "involve the 1949 regulations" (*infra*, p. 14A). But unless the court was prepared to affirm the findings insofar as they are based on the 1949 regulations, it had no alternative other than to remand the proceeding to the Board for an administrative determination whether revocation was required under the public interest standard on the basis of those findings alone which had been affirmed by the court. Thus, in the *Chenery* case, *supra* at p. 88, the court stated:

> "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

In short, the court below should have done precisely what it did in *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 288 (C.A.D.C. 1938). There the Commission had denied an application for a broadcasting license on two separate grounds, one of which the court found legally invalid. Observing that it could not be determined whether the Commission would have denied the application on the second ground alone, the court remanded the case to the Commission for further proceedings. *Cf. Winton* v. *Amos*, 255 U.S. 373, 395-96 (1921).

The same course of action must be followed in this case. Only on the assumption that the 1949 regulations are valid

is there any basis for the Board's finding that petitioners have been guilty of flagrant and continuous violations. Revocation is the severest of all the sanctions available to the Board and it certainly cannot be assumed in fact or in law that the Board would have invoked this sanction in the absence of the 1949 regulations and the findings based thereon. Accordingly, the judgment below must be reversed.

3. *Lack of Basis for Finding a Violation of Section 408.* The court below affirmed the Board's finding that the individual petitioners had acquired control of the carrier petitioners in violation of Section 408(a)(5) of the Act, and had consolidated the carrier properties in violation of Section 408(a)(1). This decision raises two issues of first impression with respect to the construction and application of this important statutory provision.

Until 1947, the irregular air carriers were entirely exempt from the provisions of Section 408 of the Act. The 1947 regulations (Section 292.1, paragraph (c)(x), Appendix C, *infra*, p. 25A) continued the exemption with respect to mergers, consolidations, and acquisitions of control of irregular carriers, but terminated the exemption insofar as the statutory provisions govern relations between such carriers and "any persons engaged in any other phase of aeronautics." Unless the individual petitioners were persons "engaged in any other phase of aeronautics," accordingly, the decision below cannot be sustained. So, too, that portion of the decision below relating to Section 408(a)(1) cannot be sustained unless petitioners' actions fall within the phrase "consolidate or merge" therein.

(a) The decision below that the individual petitioners "engaged" in a "phase of aeronautics" other than as an air carrier is contrary to the plain meaning of the language, and to the intent of Congress, abundantly evident in the legislative history of the provision. The ac-

tivities of petitioners upon which the court based its conclusion, comprised the ownership and leasing of aircraft, the sale of tickets for air transportation, the performance of accounting and fiscal services, and their control of the carriers and of a corporation engaged in selling tickets and promoting air transportation (Appendix A, *infra*, p. 9A).

Both the Board and the court below have ignored the legislative history of the Act, which plainly discloses that the phrase "phase of aeronautics," derived from an earlier phrase, "any phase of the aviation industry," was intended to include only air transportation or the manufacture and sale of aircraft and airplane engines, parts and accessories generally used in air transportation.[39] At page 292 of the *Hearings on S. 3012*, 73d Cong. 2d Sess. (1934), a witness pointed out specifically that certain proposed language which would have included more than air transportation and manufacture, was unwarranted and broader than Congress intended. Upon ultimate passage of the Airmail Act of 1934, this language was changed to meet this objection by specifically limiting its scope to the two types of activity mentioned.[40] This narrow intended meaning was adhered to through-

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[39] Investigation of the U.S. Postal Airmail Services; Report of the Committee on Post Office and Post Roads, House of Representatives, pursuant to H.R. 226, a Resolution authorizing an investigation of the expenditures of the Post Office Department, 72d Cong. 2d Sess. February 21, 1933; Revision of Airmail Laws, *Hearings before Senate Committee on Post Offices and Post Roads on S. 3012*, 73d Cong. 2d Sess. 1 (1934); *Hearings on S. 3012*, 73d Cong. 2d Sess. p. 3 (1934); Sen. Doc. No. 15, 74th Cong. 1st Sess. 18 (1937); *Hearings before Senate Subcommittee of Committee on Interstate and Foreign Commerce on S. 2 and S. 1760*, 75th Cong. 1st Sess. 118, 126, 143, 152-154, 354, 623 (1937); *Hearings before House of Representatives Committee on Interstate Commerce on H.R. 5234 and H.R. 4652*, 75th Cong. 1st Sess. 121, 122, 123, 127 (1937).

[40] Section 7 of the Airmail Act of 1934, 48 Stat. 933-936, is set forth in Appendix B to this petition at p. 20A.

out the four year legislative history of the Civil Aeronautics Act.[41]

This limited prohibition against common control relationships between manufacturers and air carrier operators was adopted to correct a specific situation, the widespread common control of these two segments of the industry.[42] There was no other problem to correct and even this limited prohibition was unprecedented. At no time during the legislative history was consideration given to broadening the scope of the provision.

The opinion of the Board, affirmed by the court below with respect to its interpretation of Section 408, would expand the meaning of the phrase "phase of aeronautics" to include almost anyone connected in any material way with any aspect of the aviation industry. What specific activities would be included and excluded, would be vague and entirely subject to case by case judicial determination. If the sale of tickets or control of a corporation engaging in such activities and the performance of accounting and fiscal functions constitutes a "phase of aeronautics," it would seem, to name but two examples, that the furnishing of fuel and activities of financial institutions making substantial loans to air carriers, in many instances in excess of net worth, would likewise constitute engaging in a "phase of aeronautics." (See Table, Appendix D at p. 36A).

Accordingly, there is no basis for the decision below that the individual petitioners violated Section 408 of the Act, and the judgment must be reversed. This unprecedented broadening of the meaning of the term to areas outside of the aviation industry would have the

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[41] See *Hearings before a Subcommittee of the Committee on Interstate & Foreign Commerce on S. 3027*, 74th Cong. 1st Sess. (1935) at 614, and see letter dated July 19, 1934 at 620.

[42] *Supra*, note 39 at p. 23.

obvious unintended result of vastly extending the Board's authority to grant immunization from the anti-trust laws to industry areas which Congress never intended to fall within the scope of its authority.[43]

(b) Contrary to the specific wording of Section 408(a)(1) and in direct conflict with a decision of this Court, the court below has held that a "consolidation of properties" can take place without there being any change in ownership of any of the properties involved.

The decision of the court below is in direct conflict with the decision of this Court in *New York Securities Corporation* v. *United States,* 287 U.S. 12 (1932), adhering to the long established meaning of certain statutory language, in interpreting a Section of the Interstate Commerce Act, Section 5(6), of which Section 408 (a)(1) of the Civil Aeronautics Act appears to be a replica.[44]

The lower court has expanded the meaning of the words "merger" and "consolidation" to include the mere control of two or more air carriers, which broadening conflicts with the well understood meaning of these words when used in statutes of this type. *Royal Palm Soap Company* v. *Seaboard Airlines Railway,* 296 Fed. 448 (C.A. 5th 1924). It must be assumed that Congress intended to use the words "merger" and "consolidation" in their ordinary and accepted meanings, when they are *not* defined differently for the purposes of a particular act. *Pineallas Ice & Cold Storage Company* v. *Commissioner of Internal Revenue,* 287 U.S. 462 (1933).

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[43] See Section 414 of the Civil Aeronautics Act, 52 Stat. 1004, 49 U.S.C. § 494.

[44] Section 5(6): "Consolidation of railroads by agreement. It shall be lawful for two or more carriers by railroad, subject to this chapter, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions. . . ."

4. *Lack of Basis Under Section 408 for Finding a Violation of Section 401 or for Revocation of Petitioners' Letters of Registration.* Even if it be assumed, contrary to the argument under the preceding heading, that the Board's findings establish a violation of Section 408(a) of the Act, that circumstance affords no basis for the conclusion, drawn by the court below, that Section 401(a) of the Act was also violated. Nor are violations of Section 408(a) a legally sufficient basis for the revocation of petitioners' Letters of Registration.

The court below held (Appendix A, *infra*, pp. 9A-10A) that the petitioners brought about a consolidation of the four carriers under the control of the four individuals in violation of Section 408(a)(1) and (5) of the Act, that the result of this action was the creation of a "single integrated carrier," and that the operations of this "integrated" carrier without a certificate violated Section 401(a) of the Act. However, the operations of each petitioner carrier were exempt from Section 401(a) under Letters of Registration.[45] It was therefore the fact of their combination into a "single integrated carrier" in violation of Section 408, under the court's theory, that resulted in a violation of Section 401.[46]

Contrary to the lower court's decision, however, this sort of violation of Section 408 is not a violation of Section 401. This was held by the Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (1941), a case with which the decision below is squarely in conflict.

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[45] Leaving aside the question of violations of the 1949 regulations, which are irrelevant here since the court below excluded those regulations from the grounds and conclusions of its judgment.

[46] Clearly, if the individual carriers entered into a lawful combination, there would have been no violation of Section 401. Under the lower court's theory, therefore, the violation of Section 408 resulted *ipso facto* in a violation of Section 401.

To be sure, there are circumstances in which a violation of a consolidation-merger-control provision such as Section 408 does constitute a violation of a basic licensing provision such as Section 401. If, without administrative approval pursuant to the regulatory statute, a licensee transfers his license and the properties and operations covered thereby to an unlicensed party, the ensuing operations are in violation of the basic licensing provision.[47]

But this is not such a case. The petitioner carriers are all operating pursuant to licenses (here, Letters of Registration rather than certificates) issued to and held by them. If, as found by the Board, they have come under the control of the individual petitioners and assuming that this circumstance is a violation of Section 408(a), nevertheless it is certainly not a violation of Section 401(a), for nothing has happened to turn a licensed operation into an unlicensed one. The contrary view taken by the court below proves too much, for it leads to the absurd result that every violation of the collateral requirements of a regulatory licensing statute results, legally speaking, in unlicensed operations, since licenses generally authorize operations only in accordance with all provisions of the regulatory statute. Whatever formal logic there may be in such a theory, there is little sense[48] and plainly no such result intended by Congress under the Civil Aeronautics Act.

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[47] See, *e.g.*, *United States* v. *Resler*, 313 U. S. 820 (1941); *United States* v.*Shelley*, 6 R.R. 2030 (S.D.Cal. 1950); *Station KFAB*, 6 R.R. 1137 (1951).

[48] If, for example, a broadcasting licensee should refuse equal opportunity to a political candidate, there would be a violation of Section 315 of the Federal Communications Act, 47 U.S.C. § 315, but surely no violation of Section 201 forbidding radio transmission without a license, even though broadcasting licenses authorize operation only in accordance with the provisions of the Federal Communications Act.

The Board itself has never treated violations of Section 408 as violations of Section 401.[49] The *Pan American Airways* case, *supra*, demonstrates the contrary. In that case, the Board granted a certificate to American Export Airlines, a subsidiary of American Export Lines, a common carrier by water. The water carrier's control of the air carrier had not been approved by the Board under Section 408, and therefore was presumably unlawful. The court held, nevertheless, that a certificate might lawfully be issued to the air carrier, and that such issuance was not dependent on compliance with Section 408.[50] It is plain that if the violation of Section 408 had also been a violation of Section 401, this procedure would have been inappropriate and meaningless, for despite the issuance of the certificate the carrier's operations would have been "uncertificated" if in violation of Section 401.

Accordingly, petitioners' violations of Section 408(a) of the Act, if indeed there were any such, did not constitute or result in a violation of Section 401(a). Nor were the violations of Section 408(a) a sufficient basis for the revocation order, for the Board is not authorized by the Act to revoke certificates or Letters of Registration as a sanction for Section 408 violations.

The Board's enforcement policy and power under Section 408 are expressly governed by paragraph (e) thereof, which provides that, after finding a violation, the Board "shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision." Obviously, revocation is not a necessary or even an appropriate measure to prevent "further" violations. What is called for is a divestment order, or some other step directed to

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[49] See, e.g., *National-Caribbean Atlantic*, 6 C.A.B. 671 (1946); *Eastern-Colonial* —— C.A.B. —— (1954).

[50] See also *American Export Airlines, Inc.*, 3 C.A.B. 294 (1941).

the specific violation. Furthermore, insofar as the violations in this case consisted of the individual petitioners' acquisition of control of the carriers in violation of Section 408(a)(5), this affords no ground for punitive action against the carriers.[51]

Therefore, even if it be assumed that the court below rightly affirmed the Board's finding that the individual petitioners violated Section 408 of the Act, the judgment below must be reversed for that finding affords no basis for the further finding that petitioners violated Section 401, nor does it support the Board's order revoking petitioners' Letters of Registration.

5. *Denial of Judicial Review of the 1949 Regulations.* Since the court below excluded the 1949 regulations from the scope of its judgment, presumably the issue of their validity is not presently before this Court. However, unless the judgment below is reversed, the result of this proceeding will be that petitioners' business will be destroyed by the application of regulations the validity of which has never been judicially reviewed, despite petitioners' repeated efforts to challenge and test them.

It is apparent from even a cursory examination of the complaint that substantially the entire case against the petitioners is predicated upon alleged violations of the 1949 regulations.[52] The violations of Section 408 are likewise charged upon the theory that the 1949 regulations did not (as the 1947 regulations did in part) exempt petitioners from that provision.[53] So, too, the violations of Section 401 are charged on the theory that petitioners' operations exceeded their exemption authority

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[51] The court below specifically excluded from its judgment of affirmance that part of the Board's order relating to violations of Section 408 by the petitioner carriers (Appendix A, *infra*, p. 14A).

[52] See paragraphs 8-11 and 15-38 of the Complaint (R. 6-8 and 9-14).

[53] See paragraphs 39 and 49 of the Complaint (R. 15).

under the 1949 regulations, and thus constituted a violation of Section 401(a).[54]

The Board sustained the validity of its 1949 regulations as applied to the petitioners, and its finding that petitioners had willfully violated those regulations by a consistent and deliberate course of conduct over a period of years was an important basis of their decision to revoke the Letters of Registration (R. 1457-73). Nevertheless, as already stated,[55] the court below specifically declined to consider the validity or applicability to these petitioners of the 1949 regulations (Appendix A, *infra*, pp. 12A and 14A).

Under the 1947 regulations, pursuant to which the Letters of Registration were issued to petitioner carriers, their operations were exempt from the applicable provisions of Sections 408 and 412. The court below made no reference to any of these exemption provisions, and rejected petitioners' contention that under the 1947 regulations the agreements and arrangements among the petitioners, by means of which their low cost aircoach operations were conducted, were legally unobjectionable. Nevertheless, the court's conclusion that petitioners were a "single integrated air carrier" (Appendix A, *infra*, pp. 9A-10A) was based upon the practices (admitted by petitioners) against which the 1949 regulations were directed, but which were not forbidden by the 1947 regulations. These included the acceptance by petitioner carriers of tickets or exchange orders sold by petitioner North American Air Coach System, the regularity of North American service achieved through "dove-tailing" the individual petitioner carrier's flights, and the common control of the petitioner carriers by means of the aircraft leases and operating agreements which the Board sought to ban by means of the 1949 regulations.

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[54] See paragraphs 41 and 42 of the Complaint (R. 15).

[55] *Supra*, pp. 13 and 20-22.

The 1947 regulations by specific language exempted petitioners from the requirements of Section 412 of the Civil Aeronautics Act under which agreements between air carriers of the types therein specified were required to be filed with the Board. Agreements under which tickets and exchange orders sold by petitioner North American Air Coach System were accepted by all petitioner carriers were thus clearly exempt even from the requirement of filing with the Board under Section 412. The 1949 regulations first undertook to prohibit such agreements.[56]

Similarly, petitioners were specifically exempt from the provisions of Section 412 insofar as that Section required the filing of agreements under which schedules of petitioner carriers were flown at such agreed times as to make available substantially regular service to the public. Such agreements are clearly "cooperative working arrangements" or agreements for "regulated stops, schedules and character of service" or for "preserving and improving safety, economy and efficiency of operation", and insofar as rates of all petitioner carriers were identical, were agreements for the "establishment of transportation rates, fares and charges" under Section 412 of the Act. The 1949 regulations undertook to make such agreements unlawful,[57] and are in fact the entire basis for the charge that petitioner carriers operated regularly in combination or collectively (R. 7-8).

In short, all evidence relied on below to support the finding that petitioners constituted a single integrated air carrier, was evidence of conduct and activities by petitioners which was entirely proper under respondent's 1947 regulations. That such conduct was in fact permissible, and that the Board so regarded it, is shown by petitioner's Exhibit 8 (R. 1209-1217). In this memorandum dated September 16, 1948 by the Chief of the

[56] Sections 291.23 and 291.24 (Appendix C, *infra*, pp. 31A-33A).

[57] Appendix C, *infra*, pp. 31A.

Board's Bureau of Economic Regulation, it was recognized that under the 1947 regulations, the irregular carriers had "grown, more or less free of Board auspices, to become a definite and recognizable factor in air transportation." Referring specifically to Sections 408, 409 and 412 of the Act, the writer stated that (R. 12-16):

> "It is believed that large irregular carriers should be subject outright to each of the above sections of the Act and that the provisos now incorporated in 292.1 which generally make exception where two or more irregular carriers are involved, should be stricken. In administering these sections of the Act, experience indicates that the Board has unnecessarily handicapped itself and placed beyond its control the arrangements in which it often has a direct interest. The present arrangement has made possible certain joint arrangements and collusions between irregular carriers which are undesirable."

The Board had in fact, in its 1947 regulations, exempted the irregular carriers from the specified statutory requirements and had thereby "placed beyond its control" the very arrangements among the petitioners against which the 1949 regulations were directed. And there is voluminous and uncontradicted evidence in the record of this proceeding that inter-carrier arrangements of this general type (cooperative operating agreements, use of common ticket agents, acceptance of exchange orders, and regular service achieved through "dove-tailing" flights) were generally established practices among irregular passenger air carriers from the inception of their operations in 1945 and 1946 (R. 525-30, 536-40, 541-42, 543-44, 548-55, 557-60, 563, 564-66, 568-69, 571-81, 582-86, 589-91, 595-97, 598-99, 600-02, 619, 620-25, 645-66, 667-68, 670-71, 672-76, 679-82, 685-91, 693-700, 701-04, 705-09, 712-15, 717-18, 735-36, 739-40, 741-45, 747-49, 753-59, 760-74, 778-93, 794-800, 804-05, 806-15, 816-23, 825-34, 835-43, 846-55, 856-62, 866-67, 873-79, 882-83, 893-94, 930-40, 942-44, 945-48, 949, 950-56, 957-62, 986, 992-95, 1015-17, 1021-22, 1023-26, 1029-31, 1033-34, 1035-37, 1044-48).

Accordingly, it is clear that the 1949 regulations radically changed the terms of the Letters of Registration previously issued to the petitioners, and constituted far reaching amendments of those Letters. This being so, it is and has been petitioners' contention that the 1949 regulations cannot be validly applied here because they were adopted by the Board in rule-making proceedings and without adjudicatory proceedings of any kind.[58]

Whether or not petitioners' contention in this respect is sound, is an issue not yet ripe for decision by this Court because the court below carefully avoided passing on the question.[59] But petitioners are certainly entitled to have the issue adjudicated, and so far all their efforts have been fruitless. Petitioners have thus been denied judicial review of the very regulations under which their Letters are to be revoked and their carrier operations terminated. Accordingly, the judgment below must be reversed.

6. *Denial of Fair Hearing.* Petitioners' challenge to the fairness of the hearing before the Board is grounded upon the Board's failure to disqualify one of its members for bias and prejudice, and its refusal to produce and consider relevant evidence from its files, requested by petitioners.

(a) Petitioners' motion to disqualify member Denny was filed on the same day that the Board subsequently handed down its decision in this proceeding, and the Board's order denying the motion to disqualify was likewise handed down on that day (R. 1435-45 and 1504-05). The Board's denial of the motion was based primarily

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[58] For the decisions dealing with this question, see *supra*, p. 10 and Footnote 24. See also *Londoner* v. *Denver*, 210 U.S. 373 (1908); *In re Carter*, 177 F. 2d 75, 78 (C.A.D.C. 1949).

[59] In fact, it appears to be the view of the court below that the 1949 regulations do not apply to irregular carriers operating under Letters of Registration previously issued and outstanding. See *Air Transport Associates* v. *Civil Aeronautics Board*, 199 F. 2d 181, 183 (C.A.D.C. 1952).

on the ground that it was filed too late, but the Board also stated that (R. 1505) "the affidavit in support of the motion does not lay a sufficient predicate for disqualifying member Denny or for further inquiry into his qualifications." The court below affirmed the Board's action, but only on the ground that the motion was not timely filed (Appendix A, *infra*, pp. 12A-13A).

In this Court, accordingly, this issue must be reviewed on the assumption that the allegations in the supporting affidavit are true. It seems beyond dispute that these allegations, to the effect that member Denny repeatedly impugned petitioner carriers' safety record even after the total lack of basis for any such accusation had been brought to his attention, were abundantly sufficient to show such bias and prejudice as would certainly warrant inquiry into his qualification to participate in the proceeding, if indeed they were not sufficient on their face to disqualify him. The only question, therefore, is whether petitioners' motion was rightly denied on the ground that it was not timely filed.

With respect to this question, the decision below has established an unprecedented, illogical, and impractical rule with respect to motions to disqualify allegedly biased members of administrative agencies. Such a ruling would enable an administrative agency to render untimely any such motion, merely by expediting the issuance of its decision after such a motion is filed.

In the present case, petitioners had no way of knowing when the Board's decision would issue, and in fact had every reason to believe that it would not be forthcoming for a considerable period of time.[60] That petitioners had been aware of the statements made by mem-

[60] Oral argument was held before the Board on May 11, 1955, and its decision was issued seven weeks later, on July 1, 1955. A review of the Board's records reveals that with the exception of one case decided in 1946 this is the shortest period of time between oral argument and final decision in any contested compliance case involving irregular carriers.

ber Denny for some time prior to the filing of the motion affords no basis for rejecting it as untimely. The filing of such a motion is a serious step, which it may often be unwise to take even though adequate grounds exist. The purpose of requiring timely filing is to avoid delay and disruption of orderly procedures and to insure that the agency be given opportunity to correct the situation. See *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37 (1952). But none of these reasons apply in the present case, for there would have been no undue delay had the Board instituted inquiry on the basis of petitioners' motion, and no delay whatsoever had it determined to act on the case without the challenged member's participation.[61]

(b) Petitioners' Exhibit 8, to which reference has previously been made (*supra*, p. 32), was published in a Senate subcommittee report, and on that basis was admitted into evidence in this proceeding by the Examiner (R. 609-11). Thereafter, and in view of the relevance and importance of that document, petitioners made application to the Board for the production of other records and documents relating to the same matter, to wit, proposals to amend the Board's regulations dealing with irregular air carriers (R. 636-44). The Examiner denied the application, and allowed no appeal to the Board from his ruling (R. 1017-19). The Board subsequently approved the Examiner's ruling (R. 917-919, 924-928).

Petitioners' Exhibit 8, accordingly, was the only document of this character to which petitioners obtained access. It plainly disclosed not only awareness that the Board's 1947 regulations permitted route type operations by irregular carriers (*supra*, p. 32), but also the intention of amending the regulations so as to make the necessary cooperative arrangements for combined

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[61] *Chafin* v. *United States*, 5 F. 2d 592 (C.A. 4th 1925); *Nations* v. *United States*, 14 F. 2d 507 (C.A. 8th 1926). See also, *Lipscomb* v. *United States*, 33 F. 2d 33 (C.A. 8th 1929).

operations by irregular carriers illegal. It was thus a vitally important piece of evidence in support of petitioners' contention that the 1949 regulations, adopted without adjudicatory hearings, were deliberately intended to make route operations by irregular carriers impossible, and eliminate them from the air carrier industry.[62]

Petitioners' request that the Board produce other relevant documentary evidence from its files was, therefore, entirely reasonable. Likewise, the denial of petitioners' application was plainly prejudicial to its case. There is, so far as petitioners are aware, no law which supports the Board's position that it is privileged against inquiry into its internal decisional process, especially in a compliance proceeding where severe sanctions may be imposed.

On the contrary, there would seem to be a plain duty on the part of the government to disclose evidence relevant to a proceeding which it has instituted. *Universal Air Lines* v. *Eastern Air Lines,* 188 F. 2d 993, 999-1000 (C.A.D.C. 1951). As was stated by Judge A. N. Hand in *Bank Line* v. *United States,* 163 F. 2d 133, 138 (C.A. 2d 1947): "It has been the policy of the American as well

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[62] The memorandum contained, *inter alia,* the following (R. 1212-13):

> "Our experience to date convinces us that, with few exceptions, it is necessary for carriers operating large aircraft to routinize their operations; that a fixed base operation of the type which we believe section 292.1 was originally intended to cover is not generally feasible for them, but they must more and more confine their operations between certain points to build up a clientele and insure themselves of adequate load factors and a balanced directional flow. The need for route operations by large carriers is further emphasized by purely operational factors—that is, considerations of maintenance, overhaul, fueling, crew change, etc. It is in the latter respect that the analogy between irregular carriers and tramp steamers breaks down, for it is necessary in the case of the former to make careful provision for their frequent overhauls and maintenance checks, crew changes, etc. Generally speaking, this cannot be successfully accomplished economically except on route operations."

as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions."

CONCLUSION

The vexing and far reaching questions of national transportation policy which this case touches have been committed by Congress to the Civil Aeronautics Board for disposition in accordance with the standards set forth in the Act. Petitioners do not ask this Court to sit in judgment on these policy issues, or move beyond the rightful area of judicial competence.

But it is the responsibility of this Court ". . . to say whether the . . . [Board] has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest." See *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1953). And it is equally the responsibility of this Court to see that lower courts do not, wittingly or unwittingly, trench on administrative functions by affirming an agency's decision on grounds different from and far less than those on which the decision was based.

Administrative agencies must be left free to err, but their decisions, right or wrong, must be reached by fair and orderly process. The petitioners have never been given a fair opportunity to show that their operations should be certificated and legalized. Despite the clear import of the Act, the Board has never allowed a single new enterprise to become a certified trunk line carrier.[63] Without adjudicatory hearing the Board has adopted regulations deliberately designed to make petitioners' operations impossible. The Board has resisted, so far

[63] *Supra*, pages 14-17. One hundred sixty-three applications for passenger trunk line certificates have been filed; none has ever been granted.

successfully, every effort petitioners have made to test the validity of the regulations. Now it is proposed to revoke petitioners' operating authority for violation of those very regulations, and this action has been approved by the court below without reference to the regulations on which the order is chiefly based. At the same time, the Board proposes to deny petitioners' long pending applications for certificates of public convenience and necessity, and for exemption under the 1949 regulations,[64] on the ground of these same violations of the same regulations.[65]

It is for the Board, not the courts, to unravel this administrative tangle. But this is unlikely to be done unless and until the Board is required by the courts to observe recognized standards of administrative practice.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

TELFORD TAYLOR and
GEORGE SOLOMON
400 Madison Avenue
New York 17, New York

HARDY K. MACLAY and
WALTER D. HANSEN
1317 F Street, N.W.
Washington 4, D. C.
Attorneys for Petitioners

Of Counsel:
LANDIS, TAYLOR & SCOLL
400 Madison Avenue
New York 17, New York

March 11, 1957

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[64] *Supra*, pp. 6-8.

[65] *North American Air Lines* v. *Civil Aeronautics Board*, —— F. 2d —— (C.A.D.C. No. 12942, decided September 13, 1956); *North American Air Lines* v. *Civil Aeronautics Board*, —— F. 2d —— (C.A.D.C. No. 13053, decided January 17, 1957); *Large Irregular Carrier Investigation*, Examiner's Initial Decision in CAB Docket No. 5132, January 10, 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12858

NORTH AMERICAN AIRLINES, INC., et al., PETITIONERS,

v.

CIVIL AERONAUTICS BOARD, RESPONDENT.

On Petition for Review of an Order of the
Civil Aeronautics Board

Decided December 20, 1956

Mr. Hardy K. Maclay, with whom *Mr. Walter D. Hansen* was on the brief, for petitioners.

Mr. O. D. Ozment, Chief, Litigation and Research Division, Civil Aeronautics Board, with whom *Messrs. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *John H. Wanner*, Associate General Counsel, Civil Aeronautics Board, *Robert L. Park*, *Gerald F. Krassa* and *Henry M. Switkay*, Attorneys, Civil Aeronautics Board, were on the brief, for respondent. *Mr. Charles H. Weston*, Attorney, Department of Justice, also entered an appearance for respondent.

Before EDGERTON, *Chief Judge*, and WASHINGTON and DANAHER, *Circuit Judges*.

DANAHER, *Circuit Judge:* The Board ordered revocation of the Letters of Registration of four large irregular carrier petitioners; that the carriers cease and desist from engaging in air transportation and from violation of the provisions of Section 408 of the Civil Aeronautics Act of 1938[1]; and further, that the remaining petitioners cease and desist from violation of the provisions of Sections 401(a) and 408 of the Act.[2] The Board's Compliance Division had charged, in essence, that all petitioners had combined through a series of arrangements to constitute a single entity for the performance of air transportation, and that the acts and conduct of the petitioners had been deliberately planned and executed for the purpose of evading and circumventing the applicable provisions of the Act and the Board's regulations. We have been asked to review and set aside the Board's Order, E-9360.

Dissenting Board Member Adams concurred "with the majority findings that the respondents have wilfully violated Part 291 of our Economic Regulations, particularly regarding our rules against the operation by an irregular carrier of frequently scheduled flights. In view of these violations I agree that some drastic sanction against the four holders of letters of registration—Twentieth Century Air Lines, Inc., Trans National Airlines, Inc., Trans American Airways, Inc., and Hemisphere Air Transport—is in order, but I do not agree that the only proper sanction in this case is revocation of those letters of registration." Making clear that he had long differed from the majority on an issue of Board policy, the dissenting member agreed that the irregular carrier petitioners should be penalized severely but thought that the order

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[1] 52 STAT. 977 (1938), as amended, 49 U.S.C. § 401 *et seq.* (1952). All references herein, except as otherwise indicated, are to the United States Code, 1952 edition.

[2] § 401(a) of the Act, 49 U.S.C. § 481(a); § 408 of the Act, 49 U.S.C. § 488.

should "yet enable them to survive." The majority in its Opinion[3] recited that "The Board is confronted with the question whether it shall call a halt to the operations of the so-called 'North American Combine'[4] for alleged knowing and wilful violations of the Act and the Board's Economic Regulations."

Section 401 of the Act expressly provides that no air carrier shall engage in air transportation without a certificate of public convenience and necessity, but Section 416 (49 U.S.C. § 496) authorizes the Board to grant certain exemptions. Pursuant thereto, and reflecting its published Findings,[5] the Board adopted regulations on May 5, 1947, exempting non-certificated air carriers "so long as they engage only in irregular services as defined in such regulations." The Board, in its Findings, noted that irregular services vary greatly and fill a need which cannot economically be performed by certificated carriers. "Because of the fact that irregular services meet a definite need and must be infrequent and irregular, such services, if properly regulated under the provisions of the Act other than those relating to certificates of public convenience and necessity, will not under present conditions have adverse competitive effect upon the services performed by the certificated air carriers."[6] The Board found further that its statutory powers to grant exemptions "extend only to air carriers." Based on its Findings and pursuant to Sections 205(a) and 416(b) of the Act,[7]

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[3] Not yet officially reported, but partially to be found as "Compliance Proceeding," 1A, CCH, Aviation Law Rep. ¶ 21,848 (July 1, 1955).

[4] The petitioners were jointly so denominated in the complaint.

[5] 12 Fed. Reg. 3076 (1947), and see 14 C.F.R. § 292.1 (1947 Supp.).

[6] Findings ¶ 2, 12 Fed. Reg. 3076 (1947).

[7] Respectively, 49 U.S.C. § 425 and 49 U.S.C. § 496.

the Board promulgated Section 292.1 of its Economic Regulations. Therein an irregular air carrier was defined to be one which does not "hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points . . . regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation, or hire, such members of the public as apply therefor. . . . No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern of normal consistency of operation between . . . such designated points . . . ." The Regulations further provided that a Letter of Registration might issue to a qualified irregular air carrier upon the filing of a proper application, but also that "Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations."

The petitioner carriers received Letters of Registration in accordance with the 1947 regulations and subject to their provisions and the conditions therein set forth.[8]

The complaint in the enforcement proceeding before the Board alleged, and the Board adopted the Examiner's finding, that control of the four petitioner carriers had been acquired by petitioners Weiss, Fischgrund, Lewin and Hart in violation of Section 408 of the Act, *infra*

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[8] Petitioners' amended answer set forth the issuance dates thus:
Twentieth Century Air Lines, Inc., July 22, 1947.
Hemisphere Air Transport, September 5, 1947.
Trans National Airlines, Inc., April 30, 1948.
Trans American Airways, Inc., May 27, 1948.

note 15, and that these individual petitioners had operated in air transportation without authority from the Board and in violation of Section 401(a) of the Act, *supra* note 2. The Examiner and the Board had found, and in our view the record amply supports the finding, that Twentieth Century (North American), Trans National and Trans American were controlled, if not beneficially owned, by Weiss, Fischgrund, Lewin and Hart. The latter individual petitioners as partners owned the partnerships, petitioners herein known as Twentieth Century Aircraft Co., California Aircraft Co., and Standard Airmotive Co., and the partnerships owned the aircraft.

Petitioner Adelman, doing business as Hemisphere Air Transport, leased aircraft from a partnership owned by other individual petitioners. Pursuant to powers of attorney and various agreements with others of the petitioners, Adelman rented or leased the Hemisphere Air Transport Letter of Registration to the "North American Combine." The Examiner found, and the record supports his finding adopted by the Board, that Adelman relinquished control over the operations of Hemisphere to the "Combine," consisting of the petitioners Weiss, Fischgrund, Lewin and Hart, their partnerships, and the petitioner companies, herein named.

Petitioner North American Aircoach System, Inc., is a corporation all of the stock in which is owned by Weiss, Fischgrund, Lewin and Hart who also, as partners, own petitioner Republic Air Coach System. The corporation, the complaint charged, and its answer admitted, "performs and furnishes for the North American Combine, the promotional, advertising, sales and other traffic generating services directly and through ticket agents employed by the Combine, handles passenger reservations, and plans and schedules flights." The partnership, Republic, the complaint charged and its answer admitted "provides and furnishes, for the North American Combine the accounting, bookkeeping, financial management, and other fiscal services, and sometimes certain ground

services and personnel for passenger handling at various airports."

The complaint charged and the answer of all petitioners except Hemisphere admitted that "substantially all" aircraft operated by the member carriers of the "Combine" have the name "The North American" on the fuselage, and the names of individual carriers do not appear. Similarly, all flights departing or arriving at various airports served by "the North American Combine" are announced over public addresses and otherwise as "North American" flights. In like manner, advertising and other public relations for the solicitation of traffic are conducted in and hold out the name of "North American" by various devices.

That there came into being an entity reasonably well described in the complaint as the "North American Combine" is, to us, abundantly clear. That this entity held itself out to the public expressly or by a course of conduct as regularly and frequently operating one or more aircraft between designated points, is beyond peradventure. That the "Combine," within the language of the 1947 Regulations, failed to perform air transportation services of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between designated points, seems overwhelmingly established. We have then the question of whether or not such conduct so far violates the Act and the regulations mentioned above as to afford a basis for the Board's order here under review.

The Board found that the "Combine" violated the statute and the regulations and that the violations were "knowing and wilful." That the acts and conduct and arrangements and the operations pursuant thereto were knowing and willful, we have no doubt whatever, and no more need be said on this aspect of the case.[9]

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[9] As to previous violations by various petitioners, see footnote 18, *infra*.

"No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing *such* air carrier to engage in such transportation . . . ."[10] "'Air Carrier' means any citizen of the United States who undertakes, whether *directly or indirectly* or by a *lease* or *any other arrangement* to engage in air transportation . . ."[11] "'Citizen of the United States' means (a) an *individual* who is a citizen of the United States . . . or (b) a *partnership* of which each member is such an individual, or (c) a corporation or association . . . of which the president and two-thirds or more of the board of directors . . . are such individuals and in which at least 75 per centum of the voting interest is owned or *controlled* by persons who are citizens of the United States . . . ."[12] "For the purposes of this subchapter, whenever reference is made to control, it is immaterial whether such control is *direct or indirect*,"[13] "'Person' means any individual, firm, copartnership, corporation, company, association, joint stock association or body politic . . . ."[14] Portions of § 408 of the Act, considered pertinent by the Board, are set forth in the margin.[15]

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[10] 49 U.S.C. § 481(a). Italics in quoted portions of the Act and the regulations have been supplied by us.

[11] 49 U.S.C. § 401(2).

[12] 49 U.S.C. § 401(13).

[13] 49 U.S.C. § 493.

[14] 49 U.S.C. § 401(27).

[15] "(a) It shall be unlawful, unless approved by order of the Board as provided in this section—

"(1) For two or more air carriers, or for *any air carrier* and . . . *any person* engaged in any other phase of aeronautics, to consolidate or merge their properties, or *any part thereof*, into one person for the ownership, management, or *operation* of the properties theretofore in separate ownerships;

Having the foregoing provisions in mind, and particularly the portions where emphasis has been added, we must determine whether the Board's findings are supported by substantial evidence. If so, its findings are conclusive.[16] We first inquire whether or not all of the petitioners were properly found in violation of Section 401(a) of the Act for, if so, quite apart from other grounds,[17] the Board's order of revocation of the carriers' Letters of Registration and its "cease and desist" orders against all petitioners on that ground must be sustained. We may then consider the basis for the "cease and desist" orders directed to the petitioners other than the

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"(2) For *any air carrier, any person controlling an air carrier* . . . or *any person engaged in any other phase of aeronautics,* to purchase, lease, or *contract to operate* the properties, or any substantial part thereof, of any air carrier;

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"(5) For any air carrier or *person controlling an air carrier* . . . or *any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;*

* * * *

"(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection." 49 U.S.C. § 488(a).

[16] 49 U.S.C. § 646(e); Kuhn v. Civil Aeronautics Board, 87 U.S. App. D.C. 130, 134, 183 F. 2d 839, 843 (D.C. Cir. 1950).

[17] The violations found by the Board may be summarized: By all petitioners as engaging in air transportation as a single carrier not holding operating authority; by all petitioners as having consolidated their properties into a single carrier; by the individual petitioners, through their acquisition of control of the irregular carriers; by the irregular carriers as having held out and operated excessive flights; by the irregular carriers as providing regular services through their combination and as failing to comply with ticketing, contracting, and reporting requirements.

carriers on account of the claimed violations of Section 408 of the Act.

It may be perceived that all of the petitioners planned a common course of action; that they arrived at an understanding or agreement to form a combination which became a single integrated air carrier; and that the carrier engaged in air transportation without being possessed of a certificate, issued by the Board, authorizing the "Combine," so organized, to engage as an air carrier in air transportation. Within the meaning of Section 408 of the Act, the individual petitioners were clearly persons engaged in various phases of aeronautics: through their ownership of the petitioner partnerships which owned the aircraft; through their control, either direct or indirect, of the petitioner carriers to which had been issued the Letters of Registration; either by themselves, or by means of entities controlled by them, through leasing or otherwise contracting for the operation of aircraft under the Letter of Registration of Adelman's Hemisphere Air Transport, thus pooling his Letter of Registration with those of the other petitioner carriers and operating frequently and regularly as part of the air transport services, aircraft which Adelman had leased from the individual petitioners or their partnership; through their stockholder interest in and control of petitioner North American Aircoach System, Inc., in which they also served as officers, Lewin as president, Fischgrund as vice president, Weiss as secretary, and Hart as treasurer; through this corporation by selling and by promoting ticket sales for air transportation in holding out, by radio and other forms of advertising, frequent and regular flights via North American; and through their partnership control of petitioner Republic Air Coach System, which carried on the accounting and fiscal services for and in behalf of the entire "Combine." The findings of the Board are amply sustained on the record here.

We entirely agree with the Board's conclusion that the course of conduct pursued by all petitioners in forming a

single integrated carrier operated in regular air transportation without a certificate of public convenience and necessity violates Section 401(a) of the Act. And we have no doubt that participation in this venture by the non-carrier petitioners constitutes the sort of consolidation to operate separate properties that Section 408(a)(1) proscribes; furthermore, the acquisition of control of the carriers by the individual petitioners was properly determined to be a violation of Section 408(a)(5) of the Act.

Whether or not we would have gone so far as to revoke the Letters of Registration of the petitioner carriers is not open for discussion. It is clear the Board considered the record disclosed "multiple independent" violations, any one of which justified revocation of the petitioner carriers' Letters of Registration. Whether or not we would have entered the cease and desist orders as to all petitioners is not for us to say. That the Board possessed authority to take the actions complained of is clear.[18] The petitioner carriers had applied for and received their Letters of Registration subject to all of the terms

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[18] Air Transport Associates v. Civil Aeronautics Board, 91 U.S. App. D.C. 147, 199 F. 2d 181 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 922 (1953); American Air Transport v. Civil Aeronautics Board, 92 U.S. App. D.C. 117, 206 F. 2d 423 (D.C. Cir. 1953); cf. American Airlines v. North American, 351 U.S. 79 (1956).

We note that in choosing the remedy of revocation the Board took into account its own record evidence of previous violations by various petitioners. For example, its Opinion noted that "Trans American is already the subject of a consent cease and desist order," Order No. E-6748, adopted August 28, 1952. In addition, the complaint in the enforcement proceeding charged that Stanley D. Weiss and James Fischgrund were for a long time prior to June 20, 1949, president and vice president, respectively, of Standard Air Lines, Inc., formerly a large irregular carrier whose Letter of Registration was revoked by the Board, June 20, 1949; that for a long time prior to June 5, 1950, R. R. Hart was president and Jack B. Lewin was traffic manager and a member of the

and conditions of the Act and the 1947 Regulations. Upon their compliance therewith depended even their permissive authorization to fly irregularly, and consequently, their exempt status. Even a certificated carrier—occupying a far more secure status—is subject to the Board's sanction in the event of violation, whether it take the form of revocation or otherwise.[19] The 1947 Regulations provided[20] that "Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any

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Board of Directors of Aero-Van Express Corporation d.b.a. Viking Airliners, also known as Viking Airlines, a large irregular carrier whose Letter of Registration was revoked by the Board on June 5, 1950; that R. R. Hart for some time prior to February 27, 1951, was president and general manager of Oxnard Skyfreight, Inc., d.b.a. North American Airlines, subsequently North American Airlines, Inc., a large irregular carrier, whose Letter of Registration was suspended by the Board, February 27, 1951, and with consent of the carrier, revoked by the Board on March 5, 1951; and that all of the irregular carriers, herein named, had suffered the revocation mentioned for knowing and willful violation of the Act and the Board's Economic Regulations, "involving the holding out and operation of regular services in air transportation between designated points without authority." The foregoing allegations were admitted by an amended answer filed in behalf of "Twentieth Century Air Lines, Inc., Trans National Airlines, Inc., Trans American Airways, Inc., North American Aircoach System, Inc., Stanley D. Weiss, James Fischgrund, Jack B. Lewin and R. R. Hart, individually and as partners, d.b.a. Republic Aircoach System, also d.b.a. Twentieth Century Aircraft Company, also d.b.a. California Aircraft Company and Stanley D. Weiss and James Fischgrund, as partners, d.b.a. Standard Airmotive Company."

[19] 49 U.S.C. § 481(h).

[20] § 292.1(d)(5).

order, rule or regulation issued under any such provision, or of any term, condition, or limitation of any authority issued under said Act or regulations."

In addition to the reserved authority for revocation, the Board is possessed of yet other powers to bring about compliance[21]: "If the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon its own initiative, that any person has failed to comply with any provisions of this chapter or any requirement established pursuant thereto, the Board shall issue an appropriate order to compel such person to comply therewith." A "cease and desist" order is clearly "appropriate," within the meaning of the Act.

We conclude that the Board's Order founded upon the violation of Section 401 of the Act and the regulations must be affirmed. The same is true with reference to violation by the non-carrier petitioners, of Section 408 of the Act and the regulations pertinent thereto. Our approval of the Board's action in revoking the carriers' Letters of Registration makes it unnecessary for us to consider in what further particulars the carrier petitioners may have violated various other provisions of the Act and of the 1947 Regulations, or whether or not, or to what extent they may also have violated the 1949 Regulations.[22]

We next consider petitioners' claim that this proceeding must be remanded because of the Board's failure to inquire into the qualifications of one of its members or because of its failure to disqualify that member from participation in the matter of which review is sought. The Board's Opinion was filed July 1, 1955. That very day petitioners had moved for the first time that Member Denny be disqualified "from further participation in this proceeding." In the motion petitioners requested

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[21] 49 U.S.C. § 642(c); and as to violations of Section 408(a) of the Act (49 U.S.C. § 488(a)), see 49 U.S.C. § 488(e).

[22] 14 C.F.R. Part 291 (1952).

a hearing before an Examiner with the right to call Board employees and others as witnesses. It will be noted, first, that petitioners in their motion recognized that "All formal steps prior to Board decision have been completed." Next, the Examiner's Initial Decision had been served February 14, 1955, and his findings and recommendations were fully available and known to petitioners and their counsel. The briefs had been submitted to the Board on April 5, 1955, and oral argument had been heard on May 11. As the Board's order indicates, most of the alleged facts dealt with situations said to have occurred a year or more previously. We need not describe them here, further than to say that Member Denny was alleged at various times to have made statements to various persons reflecting adversely on the operations and personnel of the North American group. Throughout the course of the proceedings after the purported occurrences, over a period of many months, petitioners took no step looking to the disqualification of Member Denny. Various proposals for "settlement" of the enforcement proceeding had been submitted by petitioners from time to time. As late as June 24, 1955, petitioners by letter of their counsel to the Board chairman, once again asked that "serious consideration" be given to North American's settlement proposal, and a conference was sought, all without the slightest reference to the alleged disqualification of Member Denny.

Under these circumstances we find no infirmity in the view expressed by the Board: "We think it is perfectly plain that respondents are not entitled to sit back until Board decision is imminent and at their convenience come forward with a claim for disqualification of a Board Member based upon alleged facts within respondents' knowledge long prior to consideration of this case by the Board." [23]

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[23] Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F. 2d 589 (7th Cir. 1945); cf. Trade Comm'n v.

Petitioners further charge that they were unlawfully denied access to and use of documents, evidence and testimony in the Board's possession, and relevant to show that the Board's 1949 Regulations were arbitrarily designed to cut off essential route operations. Since our conclusions do not involve the 1949 Regulations, we need say no more than that staff studies, internal departmental memoranda, and recommendations of Board experts to its members ordinarily are not subject to discovery. Under the circumstances present here, the Board's denial of access to such material reflects no error.[24]

The order of revocation of Letters of Registration of the petitioner carriers, as set forth in paragraph 1, and the "cease and desist" orders as to all petitioners, as set forth in paragraphs 2, 3 and 4 of the Board's Order under review are affirmed, except so much of paragraph 3 as may relate to possible Section 408 violations by petitioner carriers. This disposition of the case makes it unnecessary to consider paragraphs 5, 6 and 7 of the Board's Order under review. Our order of September 2, 1955, granting a partial stay of Board Order E-9360, as modified by Board Order E-9448, will be vacated in fifteen days.

Affirmed, as indicated.

Cement Institute, 333 U.S. 683, 700-703 (1948); Hammond v. Hull, 76 U.S. App. D.C. 301, 306, 131 F. 2d 23, 28 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 777 (1943); United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952); Colonial Airlines Case, 9 C.A.B. 273 (1949).

[24] United States v. Morgan, 313 U.S. 409, 422 (1941); National Labor Relations Bd. v. Botany Worsted Mills, 106 F. 2d 263 (3d Cir. 1939); Trade Comm'n v. Cement Institute, *supra* note 23.

APPENDIX B

STATUTES

I. CIVIL AERONAUTICS ACT OF 1938:

Definitions

(52 STAT. 977, as amended, 49 U.S.C. §401)

Sec. 1 As used in this Act unless the context otherwise requires—

(1) "Aeronautics" means the science and art of flight.

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

Certificate of Public Convenience and Necessity

(52 STAT. 987, 49 U.S.C. §481)

Certificate Required

Sec. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided,* that if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Issuance of Certificate

(d) (1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

Consolidation, Merger, and Acquisition of Control

(52 STAT. 1001, 49 U.S.C. §488)

Acts Prohibited

Sec. 408(a) It shall be unlawful unless approved by order of the Authority as provided in this section—

(1) For two or more carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships . . .

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever. . . .

Interests in Ground Facilities

(c) The provisions of this section and section 409 shall

not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

Investigation of Violations

(e) The Authority is empowered upon complaint or upon its own initiative, to investigate, and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Authority finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this Act, as may be necessary, in the opinion of the Authority, to prevent further violation of such provision.

Pooling and Other Agreements

(52 STAT. 1004, 49 U.S.C. §492)

Filing of Agreements Required

Sec. 412(a) Every air carrier shall file with the Authority a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and ef-

ficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Authority

(b) The Authority shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Authority may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Classification and Exemption of Carriers

(52 STAT. 1004, 49 U.S.C. §496)

Exemptions

Sec. 416 (b)(1) The Authority, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

II. INTERSTATE COMMERCE ACT:

Combinations and Consolidations of Carriers

(54 STAT. 904, 49 U.S.C. §5 (2)(a))

Sec. 5. (2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties for franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise, or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. . . .

III. ADMINISTRATIVE PROCEDURE ACT:

Definitions

(60 STAT. 237, as amended, 5 U.S.C. §1001)

Sec. 2. As used in this Act—

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, ap-

proval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

Sec. 9. In the exercise of any power or authority—

(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

IV. AIR MAIL ACT OF 1934, 48 STAT. 933, 936:

Section 7(a). After December 31, 1934, it shall be unlawful for any person holding an air-mail contract to buy, acquire, hold, own, or control, directly or indirectly, any shares of stock or other interest in any other partnership, association, or corporation engaged directly or indirectly in any phase of the aviation industry, whether so engaged through air transportation of passengers, express, or mail, through the holding of an air-mail contract, or through the

manufacture or sale of airplanes, airplane parts, or other materials or accessories generally used in air transportation, and regardless of whether such buying, acquisition, holding, ownership, or control is done directly, or is accomplished indirectly, through an agent, subsidiary, associate, affiliate, or by any other devise whatsoever: *Provided,* That the prohibitions herein contained shall not extend to interests in landing fields, hangars, or other ground facilities necessarily incidental to the performance of the transportation service of such air-mail contractor, nor to shares of stock in corporations whose principal business is the maintenance or operation of such landing fields, hangars, or other ground facilities.

(b). After December 31, 1934, it shall be unlawful (1) for any partnership, association, or corporation, the principal business of which, in purpose or in fact, is the holding of stock in other corporations, or (2) for any partnership, association, or corporation engaged directly or indirectly in any phase of the aviation industry, as specified in subsection (a) of this section, to buy, acquire, hold, own, or control, directly or indirectly, either as specified in such subsection (a) or otherwise, any shares of stock or other interests in any other partnership, association, or corporation which holds an air-mail contract.

(c). No person shall be qualified to enter upon the performance of an air-mail contract, or thereafter to hold an air-mail contract, if at or after the time specified for the commencement of mail transportation under such contract, such person is (or, if a partnership, association, or corporation, has and retains a member officer or director that is) a member, officer, director, or stockholder in any other partnership, association, or corporation, whose principal business, in purpose or in fact, is the holding of stock in other corporations, or which is engaged in any phase of the aviation industry, as specified in subsection (a) of this section.

APPENDIX C

CIVIL AERONAUTICS BOARD ECONOMIC REGULATIONS

REGULATION 400-1

TEMPORARILY EXEMPTING NON-SCHEDULED OPERATIONS FROM CERTAIN PROVISIONS OF TITLE IV OF THE CIVIL AERONAUTICS ACT OF 1938

(a) Until the Authority shall adopt further rules, regulations or orders with respect to such matter, every air carrier which engages solely in non-scheduled operations shall be exempt from the provisions of section 401 and all other provisions of Title IV of the Civil Aeronautics Act of 1938 (except as provided in paragraph (b) of this regulation). Within the meaning of this regulation any operation shall be deemed to be non-scheduled if the air carriers does not hold out to the public by advertisement or otherwise that it will operate one or more airplanes between any designated points regularly or with a reasonable degree of regularity upon which airplane or airplanes it will accept for transportation, for compensation or hire, such members of the public as may apply therefor or such express or other property as the public may offer.

(b) The exemptions provided by this regulation shall not be applicable to the provisions of subsection (L) of section 401 of the Act or to the reporting requirements of section 407 of the Act; *Provided,* That provisions of any rule, regulation or order that may be adopted by the Authority requiring reports pursuant to section 407 of the Act shall be deemed applicable to any non-scheduled operator unless such rule, regulation or order expressly provides that such provision is to be applicable to air carriers who are exclusively engaged in non-scheduled operations.

AMMENDED: December 7, 1938

SECTION 292.1 OF THE ECONOMIC REGULATIONS IRREGULAR AIR CARRIERS (effective June 10, 1947)

(Referred to in the foregoing Brief as the 1947 Regulations).

(a) *Applicability.*—This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pursuant to exemption created by any other section of the Economic Regulations.

(b) *Classification.*—There is hereby established a classification of non-certificated air carriers to be designated as "Irregular Air Carriers". An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply, therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) General.—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938 as amended, other than the following:

(i) Subsection 401(1) (Compliance with Labor Legislation):

(ii) Section 403 (Tariffs);

(iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.) only in so far as said subsection requires air carriers to provide safe service, equipment, and facilities in connection with air transportation.

(iv) Subsection 404(b) (Discrimination);

(v) Subsection 407(a) (Filing of Reports); *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407 (a) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(vi) Subsection 407(b) (Disclosure of Stock Ownership);

(vii) Subsection 407(c) (Disclosure of Stock Ownership by Officers or Directors);

(viii) Subsection 407(d) (Form of Accounts): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(d) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(ix) Subsection 407(e) (Inspection of Accounts and Property);

(x) Section 408 (Consolidation, Merger, and Acquisi-

tion of Control): *Provided,* That Irregular Air Carriers shall be exempt from section 408 in so far as said section would make it unlawful, without prior approval by the Board, (a) for any Irregular Air Carrier or any person controlling any such carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of another Irregular Air Carrier, (b) for any Irregular Air Carrier to consolidate or merger with another Irregular Air Carrier, and (c) for any Irregular Air Carrier or any person controlling any such air carrier to acquire control of another Irregular Air Carrier; *Provided further,* That any Irregular Air Carrier which consolidates or merges with another Irregular Air Carrier and any Irregular Air Carrier or any person controlling any such carrier that acquires control of, or purchases, leases, or contracts to operate the properties, or any substantial party thereof, of another Irregular Air Carrier pursuant to the exemption granting herein, shall submit to the Board, not more than 30 days following the consummation of the transaction, a report indicating in reasonable detail the nature and result of the transaction.

(xi) Subsection 409(a) (Interlocking Relationships): *Provided,* That if an application by any Irregular Air Carrier for approval of an interlocking relationship in existence on the effective date of this section is filed with the Board prior to a date 30 days after the effective date of this section, such air carrier may retain the officer, director, member, or stockholder involved in such relationship pending final disposition by the Board of said application: *Provided further,* That Irregular Air Carriers shall be exempt from subsection 409(a) in so far as said subsection would make it unlawful, without prior approval by the Board, (a) for any Irregular Air Carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in another Irregular Air Carrier,

(b) for any Irregular Air Carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in another Irregular Air Carrier;

(xii) Subsection 409(b) (Profit from Transfer of Securities);

(xiii) Section 410 (Loans and Financial Aid);

(xiv) Section 411 (Methods of Competition);

(xv) Section 412 (Pooling and Other Agreements): *Provided,* That Irregular Air Carriers shall be exempt from section 412 until 60 days after the effective date of this section: *Provided further,* That Irregular Air Carriers shall be exempt from section 412 in so far as said section would require any Irregular Air Carrier to file with the Board a copy or a memorandum of certain contracts or agreements (other than contracts or agreements for pooling or apportioning earnings, losses, traffic, service or flying equipment), or of modifications or cancellations thereof, between such carrier and any other Irregular Air Carrier;

(xvi) Section 413 (Form of Control);

(xvii) Section 414 (Legal Restraints):

(xviii) Section 415 (Inquiry into Air-Carrier Management);

(xix) Section 416 (Classification and Exemption of Carriers).

(2) *Additional Exemptions for Irregular Air Carriers Utilizing Small Aircraft.*—Subdivisions (ii), (iv), (vi), (vii), (x), (xi), (xiii) and (xv) of subparagraph (1) of this paragraph shall not apply to any Irregular Air Carrier which does not utilize in its air transportation serv-

ices any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds.

(3) *Additional Temporary Exemptions in Foreign Air Transportation.*—Notwithstanding any other provisions of this section, Irregular Air Carriers for a period of three months after the effective date of this section, shall, with respect to foreign air transportation of persons, be exempt from all provisions of sections 401 (except subsection 401(1)) and 403 of the Civil Aeronautics Act of 1938, as amended, only, however, to the extent that such foreign air transportation of persons is confined to operations of the type exempted under section 292.1 prior to this revision of such section.

(4) *Approval of Certain Interlocking Relationships.*—To the extent that any officer or director of an Irregular Air Carrier would, without prior approval by the Board, be in violation of any provision of subsection 409(a)(3) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship with another Irregular Air Carrier, such relationship is hereby approved.

(5) *Effect on Other Statutes.*—The exemptions hereinabove granted from certain provisions and requirements of sections 408, 409 and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the "antitrust laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship or agreement otherwise within the purview of such section.

(6) *Operational Reports by Irregular Air Carriers.*—On or before July 20, 1947, and thereafter on or before

the 20th day of every October, January, April and July, each Irregular Air Carrier, except those Irregular Air Carriers utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, shall file with the Board a quarterly operational report covering the period of the three preceding calendar months, showing all flights operated in air transportation during such period, and stating, with respect to each such flight, the date of departures and arrivals and the origin, destination and intermediate points served. Whenever any Irregular Air Carrier theretofore utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, undertakes to utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds, such Irregular Air Carrier shall notify the Board in writing within not more than ten days after the actual commencement of such utilization.

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.*—From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided,* That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.*—Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which, unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on CAB. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letters of Registration.*—A Letter of Registration shall be non-transferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.*—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.*—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as

amended, or of any order, rule or regulation issued under any such provision, or of any term, condition, or limitation of any authority issued under said Act or regulations.

(e) *Separability.*—If any provision of this section or the application thereof to any air transportation, person, class of persons, or circumstances is held invalid, the remainder of the section and the application of such provisions to other air transportation, persons, classes of persons, or circumstances shall not be affected thereby. (52 Stat. 984 and 1004, as amended; 49 U.S.C. 425a and 496b).

NOTE: The record-keeping and reporting requirements of this section have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

By the Civil Aeronautics Board:

/S/ M. C. MULLIGAN,
(SEAL) *Secretary.*

CIVIL AERONAUTICS BOARD, ECONOMIC REGULATIONS, JULY 1, 1949.

Part 291—*Classification and Exemption of Irregular Air Carriers*

(Referred to in the foregoing Brief as the 1949 Regulations).

Effective July 1, 1949, ER-147, 14 F.R. 3546:

Sec. 291.1 *Definitions* (a) *Irregular air carrier.* The term irregular air carrier means any air carrier which (1) directly engages in air transportation, (2) does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, and (3) does not operate, or hold out to the

public expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

Sec. 291.15 *Large Irregular Carriers; Exemptions.* Except as otherwise provided in this part, each large irregular carrier, falling within the classification above, shall be temporarily exempt from the following provisions of Title IV of the Civil Aeronautics Act of 1938, as amended:

(a) Subsection 401(a);

(b) Subsection 404(a): *Provided, however,* that each such large irregular carrier shall abide by these provisions of this subsection which require air carriers to provide safe service, equipment, and facilities in connection with interstate and overseas air transportation; and to establish, observe and enforce just and reasonable individual rates, fares and charges and just and reasonable classifications, rules, regulations and practices relating to such air transportation.

(c) Subsection 405 (e).

Sec. 291.20 *Large irregular carriers; revocation of letter of registration.* Letters of registration of large irregular carriers shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provisions of the act or of any order, rule, or regulation issued under any such provisions or of any term,

condition or limitation of any authority issued under said act or regulations.

Effective Dec. 10, 1949, Amdt. ER-154, 14 F.R. 6807:

Sec. 291.23 *Large irregular carriers; limitations and scope of exemption.* The exemption accorded large irregular carriers by this part shall not extend to the air transportation of persons hereinafter prohibited in this section.

(b) Large irregular carriers shall not carry in interstate or overseas air transportation persons who do not fall into one of the following categories:

(1) Persons to whom tickets of the carrier in the form prescribed by Sec. 291.24 have been sold and issued at the time of sale by the carrier or one of its regular employees; or,

(2) Persons who have been furnished by a ticket agent with whom the carrier has entered into a written agreement for the furnishing of passengers, and to whom tickets of the carrier in the form prescribed by Sec. 291.24 have been sold and issued by such ticket agent at the time of sale.

Sec. 291.24 *Form of tickets to be used.* Each ticket issued by the carrier, or by its authorized ticket agent, shall have printed thereon the name and address of the carrier, and shall provide appropriate spaces for, and shall have entered thereon, at the time of sale, the name and permanent address of the passenger, the date of sale, the date of flight, origin and destination points, and the fare actually paid by the passenger. Such tickets shall also be signed at the time of sale by a duly authorized officer or employee of the carrier or agent. On or after the date of flight, tickets shall be validated by the carrier in some appropriate manner on the face thereof to indicate that either the transportation service covered thereby has been rendered or appropriate refund has

been made where no service or only a part of the air transportation service has been rendered. In those cases where the carrier is by law entitled to transport any person at a free or reduced rate a pass shall be issued to such person, with the exception of those persons described in Sec. 223.3 of this chapter, prior to departure of flight and taken up by the carrier at the destination point. Each such pass shall have printed thereon the name and address of the carrier, and shall contain on its face the name and address of the passenger, the date of the flight, origin and destination points, and shall indicate the status of the passenger entitling him to free or reduced rate transportation.

Sec. 291.25 *Large irregular carriers; conditions on operating authority; payments to or from ticket agents.* As an express condition on the operating authority granted by this part and the letters of registration issued hereunder, no large irregular air carrier shall accept payment from or make payment to any ticket agent furnishing passengers or groups of passengers for transportation by air except on the basis of a written bill, invoice, or other written statement showing:

(a) The information specified in Sec. 291.24 contained in tickets sold to passengers furnished by such ticket agent.

Sec. 291.26 *Large irregular carriers; conditions on operating authority—agreements with ticket agents.* As express conditions on the operating authority granted by this part and the letters of registration issued hereunder.

(a) Each agreement between a large irregular carrier and any ticket agent shall be reduced to writing and signed by all the parties thereto, if it relates to any of the following subjects:

(3) The solicitation or generation of passenger traffic to be transported by a large irregular carrier.

(b) No large irregular carrier shall make or maintain any agreement, or participate in any arrangement, with or involving any ticket agent or air carrier with respect to the conduct or holding out of air transportation services by such carrier individually or by such carrier in combination, conjunction, or collaboration with another air carrier or carriers, where the collective air transportation service so agreed upon or arranged would, if conducted by a single carrier take it out of the classification of an irregular air carrier as set forth in this part.

Part 242—*Filing of Reports by Irregular Air Carriers and Noncertificated Cargo Carriers*

Sec. 242.5 *Filing of copies of agreements, manifests, other flight data and publicity material.* (a) All large irregular carriers and irregular transport carriers shall file with the Board, contemporaneously with filing the flight reports under Schedule F of CAB Form 242 as required by § 242.4, one copy of each of the following:

(3) *Agreements with ticket agents.* True and complete copies of every agreement between a large irregular carrier or irregular transport carrier and any ticket agent, if it pertains to any of the following subjects:

(i) The furnishing of passengers or groups of passengers for transportation by air.

(ii) The making of arrangements for flights for the accommodation of passengers or groups of passengers.

(iii) The solicitation or generation of passenger traffic to be transported by the large irregular carrier or irregular transport carrier.

Part 302—*Rules of Practice in Economic Proceedings.*

Sec. 302.11 *Limitations on practice.* (b) *Representation by persons formerly associated with the Board.*

(2) *Use of confidential information.* No person who has been associated with the Board as a member, officer

or employee, or any person associated with him, shall ever use or undertake to use in any proceeding or matter before the Board any confidential facts or information which came into the possession or to the attention of any former member, officer, or employee during his official association with the Board without first applying for and obtaining the consent of the Board for the use of such facts or information.

Sec. 302.19 *Subpenas.* (g) The provisions of this section are not applicable to the attendance of Board members, officers or employees or the production of documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the Examiner in writing and shall set forth the need of the moving party for such evidence and its relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with § 302.18 (Rule 18), except that the grant thereof by an Examiner, in whole or in part, shall be immediately reviewed by the Board upon its own initiative and shall be subject to final Board action. [*Subsection (g) added by Amendment No. 8, effective November 25, 1953, 18 F. R. 7625*]

Regulations
Serial Number ER-136

APPENDIX D

TABLE

Carrier	Net Worth (000)[1]	Recent Borrowing (000)[2]	Lending Institution[3]
American	$125,543	$75,000	Metropolitan Life Insurance Company
Continental	5,977	10,000	Chase National Bank
Eastern	88,819	90,000	Equitable Life Assurance Society
United	107,140	120,000	Metropolitan, Prudential Insurance Co., and Mutual Life Insurance Co., of New York
Western	13,784	13,500 12,000[3]	Bank of America, Prudential Life Insurance Co.,

Sources: [1] Latest Civil Aeronautics Board Form 41 Reports of Air Carriers.

[2] Carrier's 1955 Annual Report—except as indicated.

[3] Wall Street Journal, 17 May 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 829

NORTH AMERICAN AIRLINES, INC., ET AL.,
PETITIONERS

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A) is not yet reported. The findings and order of the Civil Aeronautics Board (R. 1259, 1445, 1499) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1956, and a petition for rehearing was denied on January 18, 1957. The petition for a writ of certiorari was filed on March 11,

1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Civil Aeronautics Board found that, in violation of Section 401 of the Civil Aeronautics Act, a group comprised of irregular air carriers and persons controlling such carriers had combined such carriers and various "service" companies and thereby had provided regularly scheduled air service as a single entity under the name "North American Airlines," without a certificate of public convenience and necessity; and that, without Board approval and in violation of Section 408 of the Act, the properties of the irregular air carriers had been unlawfully consolidated with those of the individuals into a single carrier, and the individuals unlawfully had acquired control of the irregular carriers. The Board revoked the operating authority of the irregular carriers, on the finding that any lesser sanction would be inadequate to insure compliance with the law. The following questions are presented:

(1) Whether there is substantial evidence to support the Board's finding that "North American Airlines" is a single air carrier which conducted regularly scheduled operations without certificate authority, in violation of Section 401 of the Act.

(2) Whether the Board abused its discretion in concluding that the public interest required revocation rather than some lesser sanction.

(3) Whether Section 408(a)(1) of the Act, which makes it unlawful without Board approval to "consolidate" properties utilized in air transportation "into one person for the ownership, management, or operation" thereof, prohibits a combination of properties into a single unincorporated enterprise.

(4) Whether persons engaged in leasing aircraft, selling airline tickets and promoting air transportation, are engaged in a "phase of aeronautics" under Section 408 of the Act.

(5) Whether the Board erred in denying, as untimely, a motion to disqualify one of its members, which was filed on the day on which the Board's decision was announced and was based upon matters known to petitioners long prior to filing.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Civil Aeronautics Act are set forth in the Appendix, *infra*, pp. 20-22. Pertinent regulations of the Civil Aeronautics Board are set forth in Appendix C to the petition (pp. 23A to 34A).

STATEMENT

The petitioners are four individuals (Weiss, Fischgrund, Lewin and Hart), and the following business organizations found by the Board to be managed and controlled by them: four "Large Irregular Air Carriers" (North American Airlines, Trans National Airlines, Trans American Airways, and Hemisphere Air Transport), an airline ticket agency (North American Air Coach System), and four partnerships

composed principally of the individual petitioners (Republic Air Coach System, Twentieth Century Aircraft Company, California Aircraft Company and Standard Airmotive Company). Collectively, the petitioners comprise "North American Airlines" or the "North American Combine" (presently doing business as "Trans American Airlines").[1] Under purported authority of the operating permits of the Large Irregular Air Carriers, "North American Airlines" has been conducting regularly scheduled airline services between New York City and West Coast points, and between New York City and Miami.

A "Large Irregular Carrier" is one authorized to conduct air transportation with large transport-type aircraft on an infrequent and irregular basis between the same cities. Such carriers do not hold certificates of public convenience and necessity, but operate under "Letters of Registration" issued by the Board pursuant to an exemption regulation promulgated under Section 416 of the Civil Aeronautics Act (49 U.S.C. 496). The 1947 regulation, under which petitioners' letters of registration were issued (Pet. 23A),[2] defined

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[1] See *American Airlines* v. *North American*, 351 U.S. 79; *American Airlines* v. *North American Airlines, Inc., et al.*, certiorari granted, 352 U.S. 988.

[2] The four carrier petitioners are authorized, on an individual basis, to conduct irregular cargo and passenger operations between any points within the United States or within United States Territory except Alaska, and between any point in the United States and any point in United States Territory including Alaska. Cargo operations are permitted between any points in the world, except between points within Alaska (see Pet. 23A, and 14 CFR 291).

an irregular air carrier as one which "does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points * * * regularly or with a reasonable degree of regularity" (*id.*). It further provides that letters of registration may be revoked "for knowing and willful violation" of any provision of the Civil Aeronautics Act or requirement thereunder (Pet. 29A).[3]

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[3] This regulation was revised in 1949 (14 CFR 291), the major change being that the blanket exemption theretofore granted was terminated. However, each carrier was permitted to continue to operate as before, pending Board determination of whether the irregular carriers as a class should be permitted to continue and, if so, to what extent, under what form of operating authority, and which particular carriers. This matter is pending before the Board in *Large Irregular Air Carrier Investigation* (C.A.B. Docket 5132). In January, 1956, the Board substituted a new temporary authorization for the large irregular carriers pending final decision in the *Large Irregular Air Carrier Investigation.* The new authorization permits, *inter alia,* operation of ten flights per month between any two domestic points without regard to regularity, but does not permit "combined" operations by individual carriers. The petitioners did not receive the new interim authorization inasmuch as they have been permitted to continue operating only by reason of stays of the Board's order here involved.

Generally speaking, an irregular carrier could, under the criteria for irregular operations established by the 1947 regulations, conduct from between eight to twelve flights per month between the same points. See *American Airlines* v. *Civil Aeronautics Board,* 235 F. 2d 845, 849 (C.A.D.C.); *Air Transport Associates* v. *Civil Aeronautics Board,* 199 F.2d 181 (C.A.D.C.), certiorari denied, 344 U.S. 922. Petitioners hold out two round-trip schedules each day over the routes which they operate (Cf. R. 1202).

In March 1953, the Board instituted an administrative proceeding charging that petitioners had knowingly and willfully violated Sections 401 and 408 of the Act, and certain provisions of the Board's Economic Regulations. Broadly, those sections prohibit any air carrier from engaging in air transportation except pursuant to a Board certificate of public convenience and necessity, and prohibit, except with Board approval, any combination of properties by air carriers and persons engaged in any other phase of aeronautics or any acquisition of control of any air carrier by any such person.

After full proceedings, the Board found that petitioners had knowingly and willfully violated the Act and the Board's regulations as follows: (1) all petitioners had violated Section 401(a) (*infra*, p. 21) by engaging in air transportation as a single carrier without holding a certificate of public convenience and necessity (R. 1454, 1455, 1457, 1465, 1472), and had violated Section 408(a)(1) (*infra*, p. 21) by consolidating their properties into a single carrier without Board approval (R. 1464, 1465, 1471); (2) the irregular carriers had violated Section 401(a) and pertinent Board regulations in that each carrier separately had held out and operated more flights between the same points than irregular carriers were authorized to provide, had provided regular services through combination, and had failed to comply with the Board's ticketing, contract, and reporting requirements (R. 1472); and (3) the individual petitioners, who were found to be persons engaged in a "phase of aeronautics," also had violated Section 408(a)(5)

(*infra* p. 21), by acquiring control of the irregular carriers (R. 1471). The Board further found that the various violations by the irregular carriers constituted "multiple independent bases" for revocation (R. 1465), and that, in view of the individual petitioners' past record of violations, "any attempt to achieve compliance through sanctions short of revocation would be an idle and vain gesture." (R. 1471). The Board also stated (R. 1469, 1470) that, since petitioners had "flagrantly" and willfully ignored the statutory plan of Congress that no one is to engage in air transportation "without a certificate of public convenience and necessity or other appropriate operating authority from the Board", "no sanction short of revocation would be sufficient to assure compliance with the law."

The Board found specifically that "North American Airlines" had conducted regular operations as a single integrated carrier under the management, control and beneficial ownership of the four individual petitioners through an intricate internal maze of intercompany relationships which were utilized in an effort to make it appear that each irregular carrier was conducting separate and independent operations (R. 1453, 1454). The *modus operandi* consisted of advertising and ticketing the services in the name of North American, providing service in aircraft marked and scheduled as North American but actually owned by three partnerships and "leased" to the particular carrier which happened to be making the flight.[4] This

[4] Petitioners Weiss and Fischgrund are the former operators of Standard Air Lines, a carrier whose Letter of Regis-

operating method, the Board found, was an attempt to prevent any individual irregular carrier from being charged with operating regularly between the same points. It was conceded before the Board that the traveling public looks upon "North American Aircoach System" as the carrier from which it purchases and obtains transportation (R. 507, 509), and the Board's examiner found, after an exhaustive review of the evidence, that petitioners' activities "are purposely designed to impress the general public that

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tration was revoked in 1949 for conducting unauthorized regular transcontinental operations, *Standard A. L. Noncertificated Operations*, 10 C.A.B. 486. Petitioners Lewin and Hart are the former operators of Viking Airliners, whose letter similarly was revoked in 1950. *Viking Airliners et al, Noncertificated Operations*, 11 C.A.B. 401. Thereafter, these four individuals embarked upon their present method of operations. They acquired ownership of the irregular carriers North American, Trans National, and Trans American, and set up "dummy officers" in an attempt to conceal their ownership. They leased or rented the Letter of Registration of Hemisphere from its owner, Adelman. They established various companies to engage in "service" activities for the air carriers. The ticket agency owned by them (North American Air Coach System) advertises the service and issues tickets therefor; the partnership Republic Air Coach System performs reservations control, accounting, and fiscal duties for the operation; the aircraft are owned by the partnerships Twentieth Century Aircraft Co., California Aircraft Co., and Standard Airmotive Co., and are "leased" to the irregular carriers. The irregular carrier North American is ostensibly the "operating carrier"; the other carriers have entered into contracts whereby North American furnishes flight personnel for them. The four individual petitioners actively manage the entire operation, which is run just as any other single airline except for the internal contractual and bookkeeping arrangements. See R. 1278-1310.

'North American Airlines' is a single entity conducting regularly and scheduled air transportation service" (R. 1311).[5]

Petitioners' primary defense in the Board proceedings was that their operating methods were permitted by the 1947 exemption regulation pursuant to which their letters of regulations had been issued; and that a 1949 amendment of that regulation which imposed additional limitations upon holders of letters of registration was unlawful because it had been adopted by rule-making, rather than by adjudicatory, procedures. The Board found it unnecessary to consider most of petitioners' challenges to the 1949 regulations, however, since the majority of violations found were of the underlying statute or the 1947 regulations.[6]

The court of appeals unanimously affirmed the Board's order. The court held that the record fully

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[5] The examiner's findings were generally adopted by the Board (R. 1452).

[6] Thus, the Board found that petitioners' operation as a single air carrier violated Section 401(a) of the Act (R. 1454-1455); that the individual petitioners' acquisition of control of the carriers and the consolidation of the various enterprises into a single entity violated Section 408 (R. 1325, 1458); and that each irregular carrier had violated the 1947 regulation through excessive individual operations (R. 1454).

Insofar as the 1949 regulations were pertinent, the Board upheld their validity (R. 1459-1461). Prior to the formation of the North American Combine, their validity had been upheld by the district court in a case in which petitioner Trans-American was a party. *Arrow Airways, et al.* v. *Civil Aeronautics Board*, D.D.C., No. 4502-50, December 4, 1950, not reported.

supported the Board's findings that the "North American Combine" had operated as a "single integrated carrier" which provided "regular air transportation" without a certificate of public convenience and necessity, in violation of Section 401(a) of the Act, and that this violation alone was sufficient to sustain the order. The court further held that the individual petitioners "clearly [were] persons engaged in various phases of aeronautics"; that the Board had correctly concluded that "participation in the venture by the non-carrier petitioners constitutes the sort of consolidation to operate separate properties that Section 408(a)(1) proscribes"; and that "the acquisition of control of the carriers by the individual petitioners was properly determined to be a violation of Section 408(a)(5) of the Act" (Pet. 10A). The court stated that it had "no doubt whatever" that the violations were knowing and willful (Pet. 6A).

Having upheld the Board's findings of statutory violation, the court found it unnecessary to consider the validity of the 1949 regulations[7], since "it was clear" that the Board viewed the record as showing " 'multiple indepesdent' violations, any one of which

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[7] The court accordingly deemed irrelevant petitioners' "further charge that they were unlawfully denied access to and use of documents, evidence and testimony in the Board's possession, and relevant to show that the Board's 1949 Regulations were arbitrarily designed to cut off essential route operations" (Pet. 14A). The court went on to state, however, that "[u]nder the circumstances present here, the Board's denial of access to such material reflects no error" (*ibid.*).

justified revocation of the petitioner carriers' Letters of Registration" (Pet. 10A).

The court also held that the Board had not exceeded its statutory authority by revoking the carriers' letters of registration instead of imposing a lesser sanction.

Finally, the court upheld the Board's action in denying as untimely a motion to disqualify Member Denny (R. 1504), filed on the day the Board issued its decision and based on matters which had been known to petitioners for many months.

ARGUMENT

1. The court of appeals upheld the Board's finding that petitioners had violated Section 401(a) of the Civil Aeronautics Act by combining a number of separate air carriers and related aviation enterprises into a single operating entity which, under the name of "North American Airlines," provided regularly scheduled air transportation without holding a certificate of public convenience and necessity. Petitioners do not directly challenge the correctness of that holding; nor do they deny, as the court below expressly held, that such a serious statutory violation justified revocation of the individual carriers' operating authority. Rather, they argue that the Board erred because it revoked the letters of registration "without reference to the statutory standard of public interest by which the Board's exercise of administrative discretion is governed" (Pet. 13); and that the court of appeals erred because it similarly failed to consider that standard, and also because it did not

pass upon the validity of certain Board regulations which petitioners were found to have violated.

The argument that the Board failed to consider the "public interest" issue rests upon the erroneous assumption that the Board "determined to revoke the Letters of Registration without weighing the consequences or considering alternative courses of action" for "bring[ing] about a state of compliance" (Pet. 19). Its opinion makes it clear, however, that the Board fully considered such an alternative, but concluded that, because of the individual petitioners' record of prior violations, any sanction "short of revocation would be an idle and vain gesture" and "would be [in]sufficient to assure compliance with the law" (R. 1469, 1470, 1471). The Board carefully weighed and rejected the views of dissenting Member Adams who, while agreeing with the majority's findings of willful violations (R. 1473), argued that some lesser sanction would suffice. Similarly, the court of appeals noted (Pet. 10A, note 18) that "in choosing the remedy of revocation the Board took into account its own record evidence of previous violations by various petitioners."

The Board "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices," and "judicial review * * * extends no further than to ascertain whether the Commission [Board] made an allowable judgment in its choice of the remedy," *i.e.*, whether it "abused its discretion in concluding that * * * [nothing short of revocation] would give adequate protection." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-612;

see *Federal Trade Commission* v. *National Lead Co.*, No. 63, this Term, decided February 25, 1957. Petitioners themselves concede (Pet. 19) that it would not "be in the public interest to tolerate continuing conditions of violation of the Act and the Board's valid regulations." In the light of the record of prior violations by various of the petitioners, we submit that the court below correctly held that the Board had not abused its discretion by selecting revocation instead of a lesser sanction.[8] Cf. *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, where this Court, in upholding the action of the Federal Communications Commission in refusing to renew a radio station license because the licensee previously had made false statements to the Commission with respect to the ownership of its stock, rejected the contention that, in order to justify refusal to renew, "the Commission should have made findings with respect to the quality of the station's service

[8] Nor did the Board abuse its discretion in refusing to consider the issue, which petitioners here raise (Pet. 15-16), as to whether, in some other proceeding, North American should, despite its record of statutory violations, receive a certificate of public convenience and necessity. That issue was fully considered in other Board proceedings in which petitioners' applications for certification were denied, and two of those denials have been affirmed by the court below on the ground that the Board properly had determined that public convenience and necessity did not require petitioners' certification. *North American Airlines* v. *Civil Aeronautics Board*, 237 F. 2d 209; *North American Airlines* v. *Civil Aeronautics Board*, No. 13,053, decided January 17, 1957, not yet reported. Petitions to review two other Board orders denying petitioners' applications for certification are pending in that court. *North American Airlines* v. *Civil Aeronautics Board*, No. 13,132; *Trans American Airlines* v. *Civil Aeronautics Board*, No. 13,620.

in the past and its equipment for good service in the future." (p. 228). The Court held (p. 229) that, although the Commission might have concluded that the station had established "such a standard of public service that * * * its deception was not a matter that affected its qualifications to serve the public * * * it is the Commission, not the courts, which must be satisfied that the public interest will be served by renewing the license," and it could not "say that refusal to renew the license is arbitrary and capricious under such circumstances."

The Board held that "any one of the four categories of violations" found, including the Section 401(a) violation, "justify the sanction of revocation" (R. 1466), and the court below noted that the Board considered the various violations found as "multiple independent" grounds for revocation. The court further held that, "quite apart from other grounds," the Section 401(a) violation constituted an adequate ground to support the order (Pet. 8A). Under these circumstances, we submit that the court below did not err in refusing to pass upon petitioners' attacks on the 1949 regulations. There is nothing in the record to support petitioners' contention (Pet. 20-22) that, if the court below had considered and invalidated the 1949 regulations, the Board upon remand might have imposed a lesser sanction. In short, the court's affirmance of the Board's finding that petitioners had violated Section 401(a) constitutes a fully adequate basis for upholding the Board's order.

Petitioners further err in their argument (Pet. 26-28) that the court below found a violation of Section 401 only because it also found that the com-

bination of the individual carriers violated the consolidation and control provisions of Section 408. The court sustained the Section 401 violation on the ground that the record supported the Board's factual finding that petitioners had created a "single integrated carrier" which provided regularly scheduled service without certificate authority. The fact that petitioners, in forming and operating such a carrier entity, also may have violated Section 408 is beside the point, for the alleged legality of petitioners' conduct under the latter section cannot justify their violations of the former. This is merely the familiar situation where the same conduct happens to violate more than one statutory prohibition. In any event, the point is immaterial since, as we show *infra*, pp. 16-18, the court correctly upheld the Board's findings that petitioners had also violated Section 408.

The question whether the "North American Combine" is an air carrier is one of fact, and the answer depends upon what the combine actually has done, not upon its operational organization. See Sections 1(2), 1(13), 1(27), *infra*, pp. 20-21; see, also, *e.g.*, *United States* v. *California*, 297 U.S. 175; *Thomson* v. *United States*, 321 U.S. 19.[9] The Board's findings, which the court of appeals upheld as supported by

[9] Partnerships and associations of corporations or individuals commonly have been treated as a carrier when in fact they operate as such. *E.g.*, *Interstate Commerce Commission* v. *Pickard*, 42 F. Supp. 351 (W.D.N.Y.); *Pennsylvania Public Utility Commission* v. *Israel*, 356 Pa. 400, 52 A. 2d 317; *State* v. *Rosenstein*, 217 Iowa 985, 252 N.W. 251; *Lowe* v. *Public Service Commission*, 116 Utah 376, 210 P. 2d 558.

substantial evidence, show that the individual air carriers have not been conducting separate operations through representation by a common ticket agent, but have been combined into a single operating entity which was "purposely designed to impress the general public that 'North American Airlines' is a single entity conducting regularly and scheduled air transportation service" (R. 1311). Since "North American Airlines" does not hold a certificate of public convenience and necessity, its operations have been in violation of Section 401(a). The correctness of that conclusion, which turns primarily upon factual issues which both the Board and the court of appeals resolved against petitioners, presents no question justifying further review by this Court.

2. The Board further found, and the court of appeals upheld the finding, that all petitioners had violated Section 408(a)(1) by combining their properties into a single carrier, and that the individual petitioners had violated Section 408(a)(5) by acquiring control of the carriers. Those provisions make it unlawful, without Board approval, (a) for any air carrier and any "person engaged in any other phase of aeronautics, to consolidate or merge their properties * * * into one person for the ownership, management, or operation" of such properties or (b) for any person engaged in any other phase of aeronautics "to acquire control of any air carrier in any manner whatsoever." Petitioners attack the decision of the court of appeals on the grounds that the consolidation provisions of Section 408(a)(1) apply only if there is a "change in ownership of * * * the properties involved" (Pet. 25), and that the individual

petitioners are not persons engaged in a "phase of aeronautics" (Pet. 22-24).

Initially, we note that the court of appeals correctly ruled (Pet. 8A-9A, 12A) that, since the Section 401 violations fully support the Board's order in its entirety, the Section 408 violations constitute only an alternative basis for the cease-and-desist portions of the order which run against the individual petitioners. In any event, we submit that the court below correctly upheld the Board's findings of violation of Section 408.

Section 408(a)(1) applies to any consolidation or merger of properties into one "person." The term "person" includes a partnership, firm or association (Section 1(27), *infra*, p. 20). Congress plainly dealt with the subject of combination in the broad sense of "joining," "uniting" or "informally combining" into a single operating entity, and not merely in the technical sense of a formal corporate consolidation. Cf. *East St. Louis Ry. Connecting Co.* v. *Jarvis*, 92 Fed. 735, 743 (C.A. 7); *State* v. *Atchison & N.R. Co.*, 24 Neb. 143, 38 N.W. 43, 51. *N.Y. Central Securities Co.* v. *United States*, 287 U.S. 12, upon which petitioners rely (Pet. 25), is not in point, since the provisions of the Interstate Commerce Act there involved dealt with consolidations or mergers of railway properties "into one *corporation* for the ownership, management *and* operation" of such properties (emphasis added), a different standard than that contained in Section 408(a)(1). The restricted construction which petitioners urge has no support in either the language or the legislative history, and would unduly limit the scope of an important regulatory provision.

The court below also correctly held that the individual petitioners are engaged in a "phase of aeronautics." The obvious purpose of that phrase, as the Board consistently has held, is to subject to Board control the relationships between air carriers and those other persons whose activities are directly related to flying or to air carrier services.[10] The activities of the individual petitioners in selling tickets, promoting the carriers, and leasing aircraft, are all integral to the conduct of air transportation, and petitioners therefore are engaged in a "phase of aeronautics." While petitioners refer to certain legislative history in an effort to show that Congress intended to regulate only ties with aircraft manufacturers (Pet. 23-24), the very sources they cite reflect a purpose to cover, among others, dealers in aircraft or accessories, holding companies and persons owning ground facilities.[11]

3. Finally, petitioners challenge the court's ruling that the Board did not err in denying as untimely their motion to disqualify Member Denny (Pet. 33-35). The ground for the motion was that he allegedly had made certain statements which reflected adversely

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[10] See, *e.g.*, *Pan Am. Airways, Inc. et al. Merger*, 2 C.A.B. 503; *Interlocking Relationships-W. A. Patterson et al.*, 3 C.A.B. 711; *Transcontinental & W. A., Control by Hughes Tool*, 6 C.A.B. 153; *Air Freight Forwarder Case*, 9 C.A.B. 473; C.A.B. Orders E-7500, June 19, 1953, E-8410, June 4, 1954; E-9254, May 27, 1955; E-9359, July 1, 1955. Compare Section 408(c).

[11] Section 7 of the Air Mail Act of 1934 (Pet. 20A-21A) on its face discloses that more was covered by the phrase "any phase of the aviation industry" than manufacturers or other air carriers.

upon petitioners. Although, as the court below pointed out (Pet. 13A), "most of the alleged facts dealt with situations said to have occurred a year or more previously * * * [t]hroughout the course of the proceedings after the purported occurrences, over a period of many months, petitioners took no step looking to the disqualification of Member Denny." On the contrary, their motion to disqualify was withheld until the morning of the issuance of the Board's decision, when the Board obviously had completed its deliberations. After careful evaluation of these circumstances, the court of appeals held that there was "no infirmity" in the Board's denial of the motion (Pet. 13A). That conclusion plainly was correct. Cf. *Delaney* v. *United States*, 263 U.S. 586; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37.

CONCLUSION

The decision below is correct, there is no conflict of decision, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Lee Rankin,
Solicitor General.

Franklin M. Stone,
General Counsel,

John H. Wanner,
Associate General Counsel,

O. D. Ozment,
Attorney,
Civil Aeronautics Board,
Washington 25, D.C.

APRIL 1957.

APPENDIX

The relevant provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973), as amended (49 U.S.C. 401, *et seq.*), are:

DEFINITIONS

SEC. 1. As used in this Act, unless the context otherwise requires—

(1) "Aeronautics" means the science and art of flight.

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Authority [Board] may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

* * * * *

(27) "Person" means any individual, firm, copartnership, corporation, company, association,

joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

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TITLE IV—AIR CARRIER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

Certificate Required

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: * * *.

* * * * *

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

Acts Prohibited

SEC. 408. (a) It shall be unlawful unless approved by order of the Authority [Board] as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

* * * * *

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

* * * * *

FORM OF CONTROL

SEC. 413. For the purposes of this title, whenever reference is made to control, it is immaterial whether such control is direct or indirect.

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